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**REPORTS OF CASES**

**DETERMINED IN**

**THE SUPREME COURT**

**OF THE**

**STATE OF CALIFORNIA**

---

**AUGUST 30, 1921, TO JANUARY 27, 1922**

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**RANDOLPH V. WHITING**  
**REPORTER**

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**VOLUME 187**

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<sup>1</sup> Resigned July 1, 1921.

<sup>2</sup> Appointed July 1, 1921, in place of Warren Olney, Jr., resigned.

<sup>3</sup> Resigned November 14, 1921.

<sup>4</sup> Appointed November 25, 1921, in place of Lucien Shaw, resigned.

<sup>5</sup> Resigned November 14, 1921.

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## ORGANIZATION OF SUPREME COURT.

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[Constitution, article VI, section 2.]

**SEC. 2.** The Supreme Court shall consist of a chief justice and six associate justices. The Court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions hereinafter contained in relation to the Court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the Court to be heard and decided by the Court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the Court in Bank at any time, and shall be the presiding justice of the court when so convened. The concur-

rence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the Court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices so assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the Court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

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**REPORTS OF CASES**  
**DETERMINED IN**  
**THE SUPREME COURT**  
**OF THE**  
**STATE OF CALIFORNIA.**

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[S. F. No. 9769. In Bank.—August 30, 1921.]

**RIO VISTA MINING COMPANY (a Corporation), Petitioner, v. THE SUPERIOR COURT OF THE COUNTY OF PLUMAS et al., Respondents.**

- [1] **DISMISSAL OF ACTION—EXPIRATION OF FIVE YEARS.**—The provisions of section 583 of the Code of Civil Procedure are mandatory in the matter of a dismissal of an action after five years except where the parties have stipulated in writing that the time may be extended beyond the five-year limitation.
- [2] **ID.—EXTENSIONS WITHIN STATUTORY PERIOD.**—Extensions of time made or stipulated to dates for trial within the statutory term of five years provided by section 583 of the Code of Civil Procedure do not operate to prolong such period.
- [3] **ID.—TRIAL AFTER EXPIRATION OF FIVE YEARS—JURISDICTION.**—A court is not deprived of jurisdiction to try a case by the mere lapse of five years after answer filed, since it is only after due notice to the plaintiff that the action may be dismissed on motion of the defendant, and until the actual dismissal the matter of going to trial remains subject to the stipulation of the parties.
- [4] **ID.—CONDUCT OF COUNSEL—CONSENT TO TRIAL AFTER EXPIRATION OF STATUTORY PERIOD.**—A court was not deprived of jurisdiction to try a case after the expiration of the five-year period provided in section 583 of the Code of Civil Procedure, although the cause was continued beyond such period by the court on its own motion without the consent of either party, where the long delay in bringing the case to trial was at the repeated request and for the accommodation of the defendants, and the defendants after the expiration of such period requested a continuance and agreed upon a new date of trial before moving for a dismissal of the action.

APPLICATION for a Writ of Mandamus to enforce the dismissal of an action. H. D. Burroughs, Judge Presiding. Denied.

The facts are stated in the opinion of the court.

W. A. Dow for Petitioner.

W. E. Davies and J. E. Ebert for Respondents.

SLOANE, J.—This matter is before this court on petition for writ of mandate to enforce the dismissal of an action for failure to bring the same to trial within five years after answer filed, as required by section 583 of the Code of Civil Procedure.

The action was brought in said superior court by one Ed Metcalf, as plaintiff, against the petitioner here, Rio Vista Mining Company, and others, as defendants. The suit was begun August 13, 1913. Various pleadings were filed, but it is conceded by the parties that the matter was finally brought to issue by a stipulated answer on September 24, 1915.

The attorney for plaintiff in this action resides at Marysville and the attorneys for petitioner reside and have their office in San Francisco, while the action was pending in the county of Plumas. Hence, it appears that most of the negotiations herein referred to have been carried on by correspondence.

The defendant, petitioner here, claiming that the action had not been brought to trial within the five-year period under section 583, *supra*, moved the court for a dismissal on the 10th of March, 1921, more than five years after answer filed.

The motion was denied in the superior court, and this proceeding followed.

On the face of the petition the petitioner was entitled to a dismissal.

[1] The provisions of section 583 of the Code of Civil Procedure are mandatory in the matter of a dismissal after five years "except where the parties have stipulated in writing that the time may be extended" beyond the five-year limitation. (*Romero v. Snyder*, 167 Cal. 216, [138 Pac. 1002]; *Larkin v. Superior Court*, 171 Cal. 720, [Ann. Cas. 1917D, 670, 154 Pac. 841].)

Respondents have set up by way of answer and affidavits certain facts upon which they rely as an extension of time for bringing the cause to trial, both by way of estoppel and stipulation.

It appears without dispute that the plaintiff had the cause set down for trial on several occasions, and that postponements were taken at the request and for the accommodation of the defendant, the petitioner herein, in each instance. None of these stipulated continuances, however, carried the time of trial beyond the five-year limitation.

[2] It has been settled under the rulings of this court that no extension made or stipulated to dates within the statutory term of five years operates to prolong the five-year period. (*City of Los Angeles v. Superior Court*, 185 Cal. 405, 197 Pac. 79]; *Larkin v. Superior Court*, *supra*.)

The five-year period dating from the filing of the answer expired on the 24th of September, 1920.

By stipulation of the parties the cause was last set down for trial, before the expiration of the five years, for June 22, 1920. There was a continuance granted at the request of defendants to the 12th of August. On or about the 10th of August the trial judge notified the parties that he had again continued the trial to December 8th on account of inability of the judge who was to hear the case to be present at an earlier date. This carried the date of trial beyond the five-year period, and the postponement was made on the court's own motion without the consent of either of the parties. However, no objection was made by either plaintiff or defendants, and as the burden was upon the plaintiff to bring the cause to trial within the time prescribed by law, it may be conceded that in the absence of further effective stipulation or waiver on the part of the defendants the action was subject to dismissal for want of prosecution at any time on defendants' motion or by the court on its own motion.

Instead of moving for a dismissal, the defendants thereafter, about the 1st of December, 1920, notified the trial court that they could not proceed to trial on the 8th of December, for the reason that one of their principal witnesses was outside the state and could not be present on the date named, and the court thereupon reset the hearing for March 2, 1921, and notified both parties of such postponement. Following this, as affiant, the trial judge



deposes, "said affiant received a request or communication from said Powell & Dow, said attorneys for said defendant, Rio Vista Mining Company [the petitioner], requesting that affiant do continue said date or time of trial from March 2d, 1921, to some time during the week commencing March 7th, 1921, as an accommodation to said firm," as they were engaged in the trial of another case in San Francisco. Thereupon, "affiant informed said Powell & Dow to take said matter up with J. E. Ebert, attorney for plaintiff, for an extension of time of trial herein," and he would appoint a new date for the trial in accordance with their agreement. Such conference was had between the attorneys for the respective parties and as a result of their meeting they agreed upon the 10th of March, 1921, as a new date of trial. Attorneys for petitioner sent to the trial judge the following telegram, signed by attorneys for both parties: "We both agree upon March 10th." The trial, pursuant to this stipulation, was again set for that date, and upon the matter coming on for hearing, the parties all being present, defendant, the petitioner here, for the first time objected to the trial of the case on its merits, and made its motion for a dismissal for failure of respondent to bring the case to trial within five years from date of filing answer.

The court denied the motion and the trial was taken up, both parties participating in contesting the action on its merits.

It is entirely clear on the face of the record that after the expiration of the five years petitioner made no move to have the case dismissed until the day finally set for trial, and that it was stipulated over the signatures of both parties that the cause be brought to trial on its merits on that day. Nothing appears in the record of any notice of objection to the trial, and the negotiations of the parties preceding the telegram clearly indicate that what they had in contemplation was a trial on the merits, in notifying the court that "We both agree on March 10th."

It seems to have been conceded by counsel on both sides at the oral argument of this petition for writ of mandate before this court, that at the conference between counsel preceding the telegram, counsel for petitioner suggested that he did not think the court had jurisdiction of the case.

The conduct of counsel for petitioner and the signed telegram were such, however, as to give the court jurisdiction if it could be conferred by the written consent of the parties.

There are no equities in behalf of petitioner in this matter. It is apparent that the long delay in bringing the cause to trial was at the repeated request and for the accommodation of the defendants, and that the attitude of defendants' counsel throughout was such as to lull the plaintiff into a sense of security as regards the provisions of section 583 of the Code of Civil Procedure. The question resolves itself into the bare legal proposition as to whether the mere lapse of five years before trial deprived the court of jurisdiction to thereafter try the case, even by consent of the parties.

[3] We do not think it did. If the parties had appeared in court at the final date set and voluntarily tried the case without objection, it will hardly be disputed that a judgment following such trial would be valid.

Where a cause of action is within the general jurisdiction of a court, the voluntary appearance of the parties and submission of the cause on its merits confers jurisdiction to try the issues presented. (*Allen v. Allen*, 159 Cal. 197, [113 Pac. 160]; *In re Crawford*, 68 Ohio St. 58, [96 Am. St. Rep. 648, 67 N. E. 156]; *Lewis v. Albertson*, 23 Ind. App. 147, [53 N. E. 1071].)

If the parties can waive the right to object to want of jurisdiction by actually going to trial they certainly can confer such jurisdiction by a stipulation to submit the cause to trial.

There is, moreover, nothing in the wording of the statute in question to deprive the court of jurisdiction upon the mere lapse of five years. It is only after due notice to plaintiff that it may be dismissed on motion of the defendant, and until the actual dismissal, there appears no reason why the matter of going to trial should not remain subject to the stipulation of the parties.

Unlike the preceding sections, 581a, and 581b, directing dismissals upon failure to issue and return summons within a specified period, or upon failure to pay fees on transfer of actions, section 583 does not require that such actions shall not be "furthr prosecuted and no further proceedings

shall be had therein," after the limited time has expired. The provision of section 583 for an extension of time for trial by stipulation of the parties, and directing notice, before dismissal on motion of the plaintiff, would suggest that even a dismissal on the court's own motion would contemplate some previous determination as to whether or not such stipulation between the parties existed. Under sections 581a and 581b the writ of prohibition has been upheld to prevent further exercise of jurisdiction in actions coming under those provisions (*Modoc Land Co. v. Superior Court*, 128 Cal. 255, [60 Pac. 848]; *White v. Superior Court*, 126 Cal. 245, [58 Pac. 450]), and such dismissal can be had without notice to either of the parties. (*Ransome-Crummey Co. v. Wood*, 40 Cal. App. 355, [180 Pac. 951].)

The only relief granted under section 583 by our decisions has been to require, on proper showing, that an order of dismissal be entered, upon the apparent assumption that until such dismissal is made or demanded the parties are at liberty to treat the action as pending and within the jurisdiction of the court. Even under sections 581a and 581b it is held that the control of the court over the action is not lost for some purposes until the order of dismissal is made. (*Consolidated Construction Co. v. Pacific Elec. Ry. Co.*, 184 Cal. 244, [193 Pac. 238].) In any event, it was competent for the parties here by consenting to go to trial upon the issues as framed in the action to confer jurisdiction upon the court to try the case.

[4] We are of the opinion that the correspondence between the plaintiff and defendant with reference to setting the case for trial after the expiration of the five-year period, followed by the signed telegram agreeing upon the date, constituted a stipulation in writing signed by the parties agreeing to bring the case to trial at a date beyond the period prescribed by section 583 of the Code of Civil Procedure.

The writ is denied.

Lennon, J., Wilbur, J., Shaw, J., Shurtleff, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Shaw, J., who was absent.

[L. A. No. 5921. In Bank.—August 31, 1921.]

BYRON ERKENBRECHER, Appellant, v. DANIEL G. GRANT, Respondent.

- [1] **CORPORATIONS—DISREGARD OF ENTITY—FRAUD.**—While it is the general rule that a corporation is an entity separate and distinct from its stockholders, it is also equally well-settled that both law and equity will, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, disregard such distinct existence, and treat them as identical.
- [2] **ID.—ESSENTIALS.**—In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it merely an instrumentality, conduit, or adjunct of its stockholders, but it must further appear that they are the business conduits and *alter ego* of one another, and that to recognize their separate entities would aid the consummation of a wrong.
- [3] **ID.—PURCHASE OF NOTES — GUARANTOR AS SOLE STOCKHOLDER — NONPAYMENT — CONTRIBUTION — STATUTE OF LIMITATIONS.**—Where a corporation purchased notes with money advanced by one of the guarantors, the fact that the guarantor was the sole stockholder of the corporation and had transferred to it all of his property did not, on the theory that the corporation and guarantor were identical and not separate entities, make such purchase a payment of the notes by the guarantor and forthwith set in motion the statute of limitations against any claim for contribution from the co-guarantors, in the absence of any showing of fraud in either the organization of the corporation, the transfer of the property or the purchase of the notes.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Reversed.

The facts are stated in the opinion of the court.

A. L. Abrahams and P. B. D'Orr for Appellant.

Albert M. Cross, Isidore B. Dockweiler, G. C. O'Connell and Dockweiler & Dockweiler & Finch for Respondent

SHURTLEFF, J.—This appeal is from a judgment in defendant's favor in an action brought against him to en-

force contribution as a co-guarantor with plaintiff and others of three certain promissory notes.

The defense urged in the answer and at the trial, and insisted upon here, is that the statute of limitations has barred the action.

The case was heard by the district court of appeal (first district, division one), and the judgment of the lower court affirmed. Thereafter the cause was transferred to this court, and the judgment again affirmed. The judgment here, and likewise the judgment of the district court of appeal, was grounded upon the assumption, the record failing to show the date of the filing of the original complaint, that the action was commenced January 28, 1918, the date upon which the amended complaint was filed. The appellant, upon discovering this omission, sought a diminution of the record, and to that end produced and filed here a certified copy of the original complaint, at the same time moving, which motion was granted, for an order vacating the said judgment of this court. The record, as thus corrected, establishes, which is a controlling circumstance, that the date of filing the original complaint was December 13, 1917. The following are the material facts of the controversy, the statement of which, with some changes and additions, is taken from the opinion of the district court of appeal:

On September 17, 1913, at San Francisco, California, the Madera Realty Company, a corporation, executed its three certain promissory notes, each for five thousand dollars, and payable as follows: One on or before December 15, 1913, and the remaining two on or before January 15, 1914. Each of said notes was indorsed and its payment guaranteed by the plaintiff, defendant, and several others. Payments were made on account of the note due December 15, 1913, but no payment was made upon the other two. After their maturity, the Navilla Investment Company, a corporation organized under the laws of this state, and hereinafter called the company, took an assignment of the notes from the holders thereof, the note first maturing being assigned on April 1, 1914, and the others on January 17, 1914. At all the times embraced in the period covering the transactions material to the inquiry plaintiff was the owner of all the outstanding shares of the capital stock of the company, some of which, though standing upon its books

in the names of others, were in fact held in trust for plaintiff. Plaintiff was at all times in control of and dictated the management and affairs of the company and advanced it the moneys which it paid for said notes when they were assigned to it, the company having theretofore acquired all of the assets of plaintiff, who at that time and at all times mentioned in the pleadings was making use of the company for the purpose of conducting his business for his own personal convenience. The company purchased the notes for the reason that the then holder of them was pressing plaintiff for payment as an indorser. On November 17, 1917, plaintiff paid the company the full amount then due upon the notes, not in cash, but by the company charging the account of the plaintiff with such amount, his account at that time showing a credit balance in his favor in excess of the amount then due and unpaid on the notes.

The trial court found the foregoing facts, and also made a finding that plaintiff's cause of action was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, which was the only provision of the statute of limitations set up in the answer, and rendered judgment accordingly in favor of defendant. It is from this judgment that this appeal is prosecuted.

Defendant contends that the foregoing facts establish that the company and plaintiff were not separate entities, but one and identical, and that, in legal effect, when the company took assignments of the notes, it amounted to payment by plaintiff, that such payment extinguished them for all purposes, and forthwith set the statute of limitations in motion against any claim or right he might have against defendant for contribution, and that the "only cause of action which accrued to plaintiff against the defendant was upon *assumpsit*, which the law implies, arising where one of two or more joint obligors is compelled to pay more than his share of the obligation, and therefore the plaintiff's cause of action was barred absolutely two years after he so took up the notes and had the same assigned to his company."

We cannot concede the correctness of defendant's contentions.

[1] While it is the general rule that a corporation is an entity separate and distinct from its stockholders, it is

also equally well-settled that both law and equity will, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, disregard this distinct existence and treat them as identical.

As said in *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310, [97 C. C. A. 144]: "While we recognize the legal principle that a corporation does not lose its entity by the ownership of the bulk or even the whole of its stock by another corporation, yet it is equally well settled courts will look beyond the mere artificial personality which incorporation confers, and, if necessary to work out equitable ends, will ignore corporate forms."

To the same effect is the following language of Circuit Judge Lurton in *Richmond & I. Construction Co. v. Richmond N., I. & B. R. Co.*, 68 Fed. 105-108, [34 L. R. A. 625, 15 C. C. A. 289, 292]: "The contract company was a legal corporation, wholly distinct and separate from the railroad company. The fact that the stockholders in each may have been the same persons does not operate to destroy the legal identity of either corporation. Neither does the fact that the one corporation exercised a controlling influence over the other through the ownership of its stock or through the identity of stockholders, operate to make either the agent of the other, or to merge the two corporations into one."

Again, in *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, [108 Am. St. Rep. 716, 60 L. R. A. 927, 93 N. W. 1024], it is said: "Equity will look behind the corporate entity, and consider who are the real and substantial parties in interest, whenever it becomes necessary to do so to promote justice or obviate inequitable results," and the law will follow equity in this respect.

There is no occasion for the application of this rule of unity in the present case. The facts do not warrant, much less demand, it. There is no finding, neither is there any evidence, to the effect that the organization of the company by plaintiff and the transfer to it by him of all his property were in any manner fraudulent or prompted by dishonesty, or that the company, in purchasing the notes, which, as we have seen, were indorsed by both plaintiff and defendant, committed or intended to commit any fraud whatsoever. It is true that plaintiff personally advanced



the money with which the company purchased the notes, but such advancement was entirely consistent with honesty and fair dealing, and bears no earmarks other than those of an open, legitimate transaction. It liquidated the obligation so far as the then owners of the notes were concerned, and in no respect whatsoever wronged or prejudiced the defendant, who was an indorser upon each of the notes, and upon failure of the maker to discharge them, became responsible for the payment thereof.

The finding of the trial court that the company acquired the notes because the then holder of them was pressing plaintiff in his capacity as indorser for payment does not negative the separate entity of the company. In the absence of any dishonest motive or intention to accomplish a wrong, and, as we have said, none was proven, we fail to discover any objection whatever to plaintiff directing the company to purchase the notes. If it be assumed that he caused their purchase for the reason that it was not then convenient for him to meet his obligations as indorser, there would still be wanting the elements to which we have referred, and the presence of which we hold is essential to justify treating plaintiff and the company as identical—as a unit. [2] In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it “merely an instrumentality, conduit, or adjunct” of its stockholders, but it must further appear that they are the “business conduits and *alter ego* of one another,” and that to recognize their separate entities would aid the consummation of a wrong. Divested of the essentials which we have enumerated, the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons, does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization.

There is abundant authority in addition to the cases we have mentioned, sustaining our view of the law. Indeed, our attention has not been directed to a case holding the contrary. While some text-books contain passages pointing to a different conclusion, an examination of the cases



cited by the author demonstrates that they not only do not support the text, but are predicated upon a version of the law similar to the one herein declared. Likewise, some of the decisions contain passages which, when taken alone, lend some basis for a different interpretation, but, when read in the light of the facts of the case, which is always essential when construing and applying judicial expressions, it is clear there was present the demand that corporate entity be ignored in order that fraud or some kindred wrong be defeated. All of the cases, so far as we are advised, in our own and other jurisdictions, which involved the abolition of corporate entity and the facts which warrant it, such as *Kelly v. Ning Yung Ben. Assn.*, 2 Cal. App. 460, [84 Pac. 321], *Chater v. San Francisco Sugar etc. Co.*, 19 Cal. 220, *Shorb v. Beaudry*, 56 Cal. 446, *Deming v. Maas*, 18 Cal. App. 330, [123 Pac. 204], and *Rutz v. Obear*, 15 Cal. App. 435, [115 Pac. 67], are in thorough accord with what precedes, and support the rule we announce.

*Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, [155 Pac. 986], is in harmony with what we have said touching the rule governing the rejection of corporate entity. In that case Abbott Kinney, the president of the Abbott Kinney Company, verified an answer of the latter in an action brought against it for an unpaid subscription to the capital stock of a certain corporation, notwithstanding, as Abbott Kinney then knew, the company had at a prior date forfeited its charter, the result of which was that Kinney had knowingly and deliberately led the plaintiff to believe that the corporation was an existing one, and induced plaintiff to prosecute its action to final judgment. An estoppel was asserted, concerning which the court said: "To countenance this conduct would be to permit Abbott Kinney and the defendant corporation to escape the payment of a just debt, . . . by the concealment of a fact which it was incumbent on Abbott Kinney to disclose. . . . We entertain no doubt of their [findings] sufficiency to raise an estoppel against Abbott Kinney personally. And upon a proper showing that the Abbott Kinney Company, a corporation, was but the instrumentality through which Abbott Kinney for convenience transacted his business, by all of the authorities not only equity, looking through form to substance, but the law itself, would hold such a corporation

bound as the owner of the corporation might be bound, or, conversely, hold the owner bound by acts which bound his corporation. (Citing cases.) But the evidence, however, is insufficient to establish this unity of interest and ownership, the only stipulation upon this matter being that 'Abbott Kinney was and now is the president of the Abbott Kinney Company, a corporation, and was and is the owner and holder of the greater portion of the stock of the said Abbott Kinney company, a corporation.' '' We have quoted thus at length from the Llewellyn case in order to point out that it involved an *estoppel*, which, had it been upheld and applied, would have thwarted a fraud, which otherwise would have been effectual.

Counsel for respondent direct our attention to a number of decisions of this court, which they earnestly maintain support their contention that the assignments of the notes on the 17th of January and the 1st of April, 1914, to the company was in reality absolute payment, and accomplished their extinguishment, but we think each of such cases is clearly distinguishable from the one we are considering, and that none of them is controlling here.

[3] The rule that payment by one of several joint obligors of the obligation, or by any one acting for him, or who takes an assignment of the obligation, extinguishes it, is not applicable here, for such payment or assignment is by, or runs to, one who is responsible, which was not the case here. There was no duty whatsoever resting upon the company to pay the notes in question, and it is for this reason that *Wright v. Mix*, 76 Cal. 465, [18 Pac. 645], *Gordon v. Wansey*, 21 Cal. 77, *Yule v. Bishop*, 133 Cal. 574, [62 Pac. 68, 65 Pac. 1094], and similar cases, are not decisive of this controversy. Equally without application, and for the same reason, are the numerous cases to the effect that payment by a surety puts an end to the obligation. In the instant case, we repeat, the company was in no manner liable, but was a stranger to the obligations; it did not pay, but purchased the notes, and under such circumstances it cannot be said, upon reason or authority, they were extinguished.

The court found, and there is a similar finding, except as to dates, as to each of the notes, "That on the seventeenth day of January, 1914, the Navilla Investment Company

purchased said note." Under the facts appearing, we hold it was an absolute, *bona fide* purchase by the company acting in its separate entity, and by reason thereof, as was its intention, it became, in its distinct capacity, the owner and holder of the notes. (*Frank v. Brady*, 8 Cal. 47.)

Having determined that the company and the plaintiff were separate entities, it follows that section 1473 of the Civil Code, which declares that "full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it," is not applicable, for the reason that, as we have said, the transaction was a *purchase* and not *payment* of the notes by the company, and that there was no evidence of an intention upon the part of the company, or of the assignor and holder, to extinguish them. As previously stated, there was no "duty" resting upon the company to pay the notes; neither was the act of the company a payment on behalf of the plaintiff and with his assent, one or the other of which conditions is essential to bring the transaction within the provisions of the section. (Civ. Code, sec. 1473.) There was manifest here a definite design on the part of the company to keep the notes alive and hold them as *its* property, all of which, we declare, did not or could not prejudice the defendant and was not to his disadvantage

While the court found that the payment of the notes by the plaintiff on November 17, 1917, was not made by him as indorser, we think such finding was error and that there is no substantial evidence supporting it. In fact, the record establishes the contrary. The finding is predicated upon the theory, which we declare to be untenable, that the company and plaintiff were identical.

From what precedes, it follows that when, on November 17, 1917, plaintiff paid the notes to the company, which was then the sole owner of them, the effect was to vest in him the right to compel contribution from the defendant, his coindorser, for his proportion of the amount so paid, which he is endeavoring to do in this action, and the same, having been commenced December 13, 1917, was in time. (Code Civ. Proc., sec. 339.)

Judgment reversed.

Shaw, J., Sloane, J., and Wilbur, J., concurred.

[L. A. No. 6550. In Bank.—August 31, 1921.]

**FREDERICK HENRY NUSBICKEL et al., Respondents,  
v. STEVENS RANCH COMPANY (a Corporation),  
et al., Appellants.**

**[1] BOUNDARY — UNCERTAINTY OF TRUE LOCATION — AGREED LINE.—**

When two adjoining owners of land, being uncertain as to the true location of the boundary line between their contiguous land, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the period of the statute of limitations, or under such circumstances that substantial loss will be caused by a change of its position, such line becomes in law the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements, notwithstanding the true position of the dividing line could always have been determined by a correct measurement or by a survey.

**[2] ID.—INTENTION OF ADJOINING OWNERS—EXTENT OF CLAIMS—CONSISTENCY WITH DOCTRINE.—**The doctrine of agreed boundaries is not nullified by the fact that adjoining owners never intended to claim anything beyond the true line. Such intention is entirely consistent with the doctrine.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. Reversed.

The facts are stated in the opinion of the court.

Nichols, Cooper & Hickson for Appellants.

Newmire & Watkins for Respondents.

**SHAW, J.**—The defendants appeal from a judgment in favor of the plaintiffs in an action by the plaintiffs against the defendants to quiet their title to a strip of land lying along the eastern side of the land in their possession.

The real point in dispute at the trial was the location of the dividing line between the plaintiffs' land on the west

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1. Location of boundary by acquiescence or agreement, notes, 27 Am. Dec. 121; 69 Am. Dec. 711; 27 Am. Rep. 239; 10 L. R. A. (N. S.) 610.

and the defendants' land on the east. Plaintiffs' land is a part of the southeast quarter of section 34, township 14 north, range 9 west, in Los Angeles County. The defendants' land is the north half of the southwest quarter of section 35 in said township and range. These sections join each other, section 35 being the easterly of the two. The common boundary line between them would be the common boundary line between the lands of the plaintiffs and defendants, respectively. The true line between the sections, according to private resurveys of the official government survey, is the line now claimed as the boundary line by the plaintiffs. The defendants, owning the tract on the east, claim up to a line situated west of that claimed by the plaintiffs, and which has been treated and considered as the dividing line between the two parcels for more than thirty years prior to the beginning of the action. The distance between the two lines is 11.35 feet at the south end and 32.2 feet at the north end.

[1] The law on the subject of agreed boundaries differing from the true line is well settled by the decisions of this court. When two adjoining owners of land, being uncertain as to the true location of the boundary line between their contiguous land, "agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the period of the statute of limitations, or under such circumstances that substantial loss will be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements." (*Young v. Blake-man*, 153 Cal. 481, [95 Pac. 890]; *Loustalot v. McKeel*, 157 Cal. 640, [108 Pac. 707]; *Price v. De Reyes*, 161 Cal. 484 [119 Pac. 893]; *Silva v. Azevedo*, 178 Cal. 495, [173 Pac. 929].)

The fact that the true position of the dividing line "could always have been determined by a correct measurement," or by a survey, does not prevent there being an uncertainty, within the meaning of this rule, in the minds of the parties as to the position of the line on the ground. "This condition exists in virtually every case in which the aid of the rule is sought." (*Silva v. Azevedo*, 178 Cal. 498,

[173 Pac. 930]; *Loustalot v. McKeel*, 157 Cal. 641, [108 Pac. 707]; *Price v. De Reyes*, 161 Cal. 489, [119 Pac. 893].)

The land claimed by the plaintiffs was originally in the possession of one Marjory Shuler, who entered the same as a homestead about the year 1879. Her death occurred a year or two thereafter, and thereupon her son, Eli W. Shuler, occupied the premises as an entryman under the United States and subsequently obtained the patent therefor. He remained in possession thereof until 1915, when he conveyed the land to the plaintiffs. The land claimed by the defendants was in the possession of one Cunningham as a pre-emptioner in the year 1880, and in the year 1883 he sold his claim to John A. Stevens, who afterward received a patent from the United States under his claim as pre-emptioner. When Stevens got possession of the land on the east he put up a fence on the line marked as hereinafter stated. From 1883 until 1917 Stevens and his successors in interest, the defendants herein, occupied the premises and used and cultivated the same on the easterly side of the fence, and Eli W. Shuler occupied, used and cultivated the land on the westerly side of the fence until 1915, when he conveyed the same to plaintiffs, and thereafter, until 1917, plaintiffs occupied and used the land up to said fence, but no further, and they did not claim title east of said fence until the year 1917.

The court found that Marjory Shuler, while she was in possession under the United States, employed some person to make a survey to establish a dividing line between the land so occupied by her and that so occupied by Stevens' predecessor in title, and thereupon caused furrows to be plowed along the line of stakes set up by the person employed to make said survey, and that said Stevens' immediate predecessor in title inspected the same and acquiesced in their location. Also, that more than thirty years ago a fence was built by Stevens along a part of the line so located as aforesaid, and that thereafter plaintiffs' predecessor, Eli W. Shuler, completed a portion of the same; that thereafter said fence was kept in repair by the respective occupants on both sides thereof, and that it has ever since remained on the line upon which it was originally con-

structed; that said fence was recognized and accepted by both Stevens and Shuler "so long as they remained the occupants and owners of their respective properties, and was treated by them as being on the line between their respective properties, and each of them occupied and cultivated and farmed the lands on their respective sides of said fence up to the same"; and that said Stevens and Shuler "so long as they remained the owners of their respective properties believed that said fence was located upon the true line."

The findings also state that the line so located was not the true location of the section line as laid out by the government surveyors, and that the surveyor employed by Marjory Shuler did not mark the true division line between said sections. The findings also state that there was not at that time any uncertainty in the true location of said line, but that "solely by and through the mistake of said surveyor the said true east line of said section 34 was not ascertained by the plaintiffs' predecessors, or themselves, until the year 1917," at which time a new survey disclosed the error. There is another finding that the strip of land between the true section line as subsequently ascertained "and the fence so built and maintained as aforesaid has been for a long time past cultivated by the defendants, but that said cultivation was done solely through a mistake in the locating of the said fence line aforesaid and not otherwise; the court finds that it has never been the intention of the plaintiffs and their predecessors to claim anything east from the east line of said section 34, and that it has never been the intention of the defendants to ever claim any land west of said east line of section 34."

It will be observed that all the findings aforesaid, except the one last mentioned and the one to the effect that there was no uncertainty in the line, bring the case precisely within the rule set forth in the authorities heretofore cited.

The finding that "there was no uncertainty in the true location of the said east line of section 34," at the time the survey was made for Marjory Shuler, must, in view of the other findings, be understood merely as a statement of the abstract proposition that it was possible to ascertain the true location thereof by a correct resurvey of the line as



marked by the government surveyors. This finding is immaterial in the application of the doctrine under consideration. The word "uncertainty" is used in the statements of the rule in the decisions to convey the idea that at the time of the location of the division line neither of the coterminous owners knew the true position of the line on the ground. In *Sneed v. Osborn*, 25 Cal. 626, in which the doctrine was first laid down in this state, the word "uncertainty" is not used. Even if the parties knew the position of the government monument at the southeast corner of the section, it would not necessarily follow that they knew the position of the line at a point a quarter of a mile north of that monument, especially where, as in this case, the ground between the north and the south ends of such section line is mountainous and extremely rough and steep. It should be remembered, in applying the doctrine, that it is only resorted to where the line agreed on is different from the true line. It is this fact that creates the necessity for the doctrine. (9 Corpus Juris, 231.) The belief of the parties for the long period of thirty years following the location, as shown by the findings, is a sufficient reason for the application of the doctrine, so far as that state of mind is essential thereto. The fact that it was founded on a mistake always appears, and must appear, else there would be no occasion to invoke the doctrine.

[2] The facts, as found, that the plaintiffs and Shuler never intended to claim anything east of the true section line and that the defendants never intended to claim anything west of the true section line may have been taken by the learned judge of the court below to have the effect of nullifying the doctrine above stated concerning the agreed boundary, since otherwise he could not have given judgment for the plaintiffs in the action for the strip of land in controversy. This intention, however, is entirely consistent with the doctrine of agreed boundaries. Having agreed upon the line as the true line, and believing that it is, it follows that neither one would intend to claim any land beyond that line, unless he was dishonest in making the agreement. The finding is, therefore, wholly without effect to justify the conclusion of law that plaintiffs are the owners of the strip of land in controversy. Our conclusion is that the



judgment in favor of the plaintiffs was not justified by the findings.

The judgment is reversed.

Sloane, J., Shurtleff, J., Lennon, J., Wilbur, J., Angelotti, C. J., and Lawlor, J., concurred.

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[Crim. No. 2390. In Bank.—September 12, 1921.]

In the Matter of HEIKICH TERUI on Habeas Corpus.

- [1] UNITED STATES GOVERNMENT—TREATY-MAKING POWER—POWERS RESERVED BY STATES.—While the government of the United States is a government of delegated powers, the states retaining such powers as they have not delegated or surrendered to it, the people of the several states have surrendered the whole treaty-making power to the federal government, and vested it in the President and Senate of the United States (sec. 2, art. II, U. S. Const.), and have expressly excluded each state from all power in this regard (sec. 10, art. I, U. S. Const.).
- [2] ID.—TREATIES—SUPREME LAW.—As to all matters within the treaty-making power conferred by the federal constitution, a treaty entered into on the part of the United States by the President with the concurrence of two-thirds of the United States Senate is a part of the supreme law of the land, binding on all states and to which all state enactments in conflict therewith must yield.
- [3] TAXATION—ALIENS—PREVENTION OF DISCRIMINATION—PROPER SUBJECT FOR TREATIES.—The protection which should be afforded to the citizens of one country residing in another against discrimination in matters of taxation based solely on their alien citizenship is a proper subject of negotiation between our government and the government of other nations.
- [4] UNITED STATES GOVERNMENT—TREATIES—TERRITORIES.—The word "territories" used in article I of the treaty between the United States and Japan was undoubtedly used as meaning the entire domain over which dominion was exercised by each of the sovereign nations, which, of course, in so far as the treaty-making power was concerned, included all of the states of the United States.
- [5] ID.—ALIEN POLL TAX LAW—INVALIDITY OF.—In view of the provisions of the existing treaty between the United States and Japan, providing, among other things, that the citizens or subjects of

neither shall be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects, the alien poll tax law of California is ineffective for any purpose with relation to any citizen of Japan.

APPLICATION for Writ of Habeas Corpus to discharge petitioner held in custody for failure to register under the alien poll tax law. Petitioner discharged.

Albert H. Elliot and Guy C. Calden for Petitioner.

U. S. Webb, Attorney-General, for Respondent.

ANGELLOTTI, C. J.—The petitioner, an alien male inhabitant of the state of California of the age of about thirty-five years and a subject of the empire of Japan, is held in custody by the chief of police of the city of Oakland, upon a complaint charging him with having failed to register as required by the terms of an act of the legislature, entitled "An act to add a new chapter to title nine of part three of the Political Code, to be numbered chapter nine thereof, embracing sections three thousand eight hundred thirty-nine to three thousand eight hundred fifty-six, both inclusive, providing for the levy and collection of poll taxes pursuant to the provisions of section twelve of article thirteen of the state constitution as adopted November 3, 1920," enacted at the legislative session of 1921.

This act, commonly known as the alien poll tax law, provides that "every alien male inhabitant of this state over twenty-one years of age and under sixty years of age, except paupers, idiots and insane persons, must annually pay a poll tax of ten dollars, . . . ." In the year 1921 this tax becomes due and payable on the first day of August, and delinquent if not paid on or prior to December 1st. It contains provisions requiring "every person liable to pay such poll tax" to register as provided in the act, such registration in the year 1921 to be effected on or before July 31st.

As is stated in the title to the act, it was enacted pursuant to the mandate of section 12 of article XIII of the constitution as amended under the initiative provisions of our constitution, at the general election of 1920. Prior to

the amendment, this section of the constitution was as follows: "No poll tax or head tax for any purpose whatsoever shall be levied or collected in the state of California." By the amendment of 1920 it was made to read as follows: "The legislature shall provide for the levy of an annual poll tax, and the collection thereof by assessors, of not less than four dollars on every alien male inhabitant of this state over twenty-one and under sixty years of age, except paupers, idiots and insane persons. Said tax shall be paid into the county school fund in which county it is collected."

The legislation, both in the constitution and the act, is purely for revenue purposes, an exercise solely of the power of taxation, and contains nothing in the nature of an exercise of the police power of regulation, the provisions relative to registration being solely for the purpose of facilitating the collection of the tax from those liable therefor, and merely incidental to the matter of collecting the tax. It is indeed expressly declared in section 2 of the act that it is one "providing for a tax levy," and, therefore, that it "shall take effect immediately." It is provided in the act that "every person subject to the payment of the poll tax hereby imposed who shall, 1. Fail, neglect, or refuse to register as herein provided" shall be "guilty of a misdemeanor, and, upon conviction thereof, shall be punished in the manner provided by law." It should be noted that under our laws no poll tax or capitation tax, or its equivalent, is levied upon citizens of the state.

Petitioner seeks his discharge from custody, claiming that the complaint fails to state a public offense. His specific claims in this regard are, first, that the act is entirely ineffective as to all aliens who are subjects of the empire of Japan in view of a provision in the existing treaty between this country and the empire of Japan, proclaimed April 5, 1911, and, second, that the act is void as to all alien inhabitants of the state, in that it denies to persons within the jurisdiction of the state the equal protection of the laws, in violation of a provision of section 1 of article XIV, amendments to the constitution of the United States.

As to the first claim, viz., that the act is ineffective as to all aliens who are subjects of the empire of Japan in view of a provision in the existing treaty between this country

and the empire of Japan, proclaimed April 5, 1911 (37 Stat. 1504).

Article I of this treaty, after providing that "the citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade," etc., "and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established," provides:

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

It is, of course, obvious that the alien poll tax law of California does, without any pretext whatever, require Japanese subjects, as well as all other aliens, to pay taxes both other and higher than those required to be paid by citizens of the United States. No poll tax or its equivalent is required to be paid by the latter, and the alien is liable equally with the citizen for all other kinds of taxes imposed, with the result that this poll tax is an additional tax imposed solely by virtue of his being an alien. It would seem also that the effect of such a tax would be that the alien is not allowed to enjoy in respect to "the most constant protection and security for their persons and property," the "same rights and privileges as are or may be granted to native citizens . . . , on their submitting themselves to the conditions imposed upon the native citizens . . . ". No one can fairly dispute that the act openly and avowedly discriminates against alien residents in the matter of taxation for revenue purposes.

It cannot be disputed at this stage in our history that if these provisions of the treaty were intended to be applicable in the several states of the United States, as well as in its other territorial possessions, and are within the proper scope of the treaty power of the United States, they render our

alien poll tax absolutely ineffective as against alien residents who are Japanese citizens or subjects. Certain propositions with relation to treaties between the United States and other nations are now so thoroughly settled, in view of express constitutional provisions and the decisions thereunder, that they are practically elementary law. [1] While the government of the United States is a government of delegated powers, the states retaining such powers as they have not delegated or surrendered to it, the people of the several states have surrendered the whole treaty-making power to the federal government, and vested it in the President and Senate of the United States (sec. 2, art. II, U. S. Const.), and have expressly excluded each state from all power in this regard (sec. 10, art. I, U. S. Const.). They have further expressly declared in the federal constitution as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (Sec. 2, art. VI.)

[2] From the first decision of the supreme court of the United States upon this subject rendered in 1796 (*Ware v. Hylton*, 3 Dall. (U. S.) 199, [1 L. Ed. 568]), to the present day, it is uniformly declared, as the express language of the federal constitution unequivocally requires, that as to all matters within the treaty-making power conferred by the federal constitution, a treaty entered into on the part of the United States by the President with the concurrence of two-thirds of the United States Senate, is a part of the supreme law of the land, binding on all states and to which all state enactments in conflict therewith must yield. (See *Geofroy v. Riggs*, 133 U. S. 258, 266, [33 L. Ed. 642, 10 Sup. Ct. Rep. 295]; *Hauenstein v. Lynham*, 100 U. S. 483, [25 L. Ed. 628, see, also, Rose's U. S. Notes].) As was said in *Ware v. Hylton*, *supra*: "It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state, and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only by a repeal or nullification by

a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole." As was said in *Hauenstein v. Lynham*, *supra*, "it must always be borne in mind that the constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution." The learned attorney-general, of course, does not dispute these well-settled propositions.

It is suggested, however, that the subject here covered by the treaty, including as it does matters relative to the exercise of their sovereign power of taxation by the several states, is not within the proper scope of the treaty-making power conferred by the people in the federal constitution. It is to be noted at once that the treaty provisions in no degree purport to limit the several states in the matter of imposing or collecting taxes, except simply to require that in such matter there shall be no discrimination as against Japanese citizens residing therein, the express provision with regard to taxes being that neither American citizens residing in Japan nor Japanese citizens residing in America shall be compelled "to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects." This is simply a provision to prevent discrimination on the part of one against the subjects of the other residing in its territory, placing in so far as the kind and amount of taxes are concerned native citizens and the subjects of the other nation upon an equal footing.

It may at once be conceded for all the purposes of this case that there are matters without the proper scope of the treaty power of the United States, matters which could not fairly be held to be included in the grant of that power by the people of the several states to the federal government. We are aware of no decision of the supreme court of the United States by which a treaty provision has been declared to be beyond the treaty power, but it may fairly be claimed that there are such matters. But that the treaty-making power includes such matters as are covered by the provisions here involved cannot be seriously questioned. The rule, as declared in *Geofroy v. Riggs*, 133 U. S. 258, 266, [33 L. Ed. 642, 10 Sup. Ct. Rep. 295, 297, see, also, *Rose's U. S. Notes*], by the supreme court of the United States, the ultimate authority on such a question

is that "the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations," and, with regard to such matters, is "in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states." The court there said that it would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. The court then said: "But with those exceptions [i. e., those stated in portion last above quoted] it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country," citing cases including our own case of *People v. Gerke*, 5 Cal. 381. In *Geofroy v. Riggs, supra*, it was held that it was clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. (See, also, in this connection, *Hauenstein v. Lynham*, 100 U. S. 483, 489, 490, [25 L. Ed. 628, see, also, Rose's U. S. Notes].) [3] It seems to us to be too clear to admit of argument that the protection which should be afforded to the citizens of one country residing in another against discrimination in matters of taxation based solely on their alien citizenship is a proper subject of negotiation between our government and the governments of other nations, and that there is nothing in the provisions under discussion that was beyond the treaty power of the United States.

We have assumed thus far, contrary to a suggestion of the learned attorney-general, that the provisions of the treaty here involved must be construed as applicable to the several states of the United States, as well as in its other territorial possessions. As to this there cannot be the slightest doubt. There is no word in the treaty to indicate an intention to make such an unreasonable limitation on its provisions relating to the rights of the citizens of one



nation "in the territories of the other," and one so contrary to the whole intent and purpose of a treaty between sovereign nations. [4] The word "territories" used in article I of the treaty was undoubtedly used as meaning the entire domain over which dominion was exercised by each of the sovereign nations, which, of course, in so far as the treaty-making power was concerned, included all the states of the United States.

[5] There is no possible escape from the conclusion that, in view of the provisions of the existing treaty between the United States and Japan, the alien poll tax law is ineffective for any purpose with relation to any citizen of Japan. The complaint under which petitioner is held charges only a violation of this act. It therefore fails to state a public offense as against him.

In view of our conclusion on the matter discussed, it is unnecessary in this case to discuss the claim made under the fourteenth amendment to the constitution of the United States.

It is ordered that the petitioner be discharged from custody.

Shaw, J., Lawlor, J., Wilbur, J., Lennon, J., Shurtleff, J., and Sloane, J., concurred.

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[Crim. No. 2394. In Bank.—September 12, 1921.]

In the Matter of GUILLERMO D. KOTTA on Habeas Corpus.

[1] **TAXATION—ALIEN POLL TAX LAW—UNCONSTITUTIONALITY OF.**—The alien poll tax law of California cannot be enforced, for the reason that by its enforcement the state of California would deny to persons within its jurisdiction the equal protection of its laws, in violation of the provision of section 1 of the fourteenth amendment to the constitution of the United States that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

[2] **ID.—CONSTRUCTION OF FOURTEENTH AMENDMENT OF UNITED STATES CONSTITUTION—MEANING OF WORD "PERSON."**—The word "person"



as used in the fourteenth amendment to the constitution of the United States, providing "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," includes aliens, and the provisions are universal in their application to all persons within the territorial jurisdiction, without any regard to any difference of race, of color, or of nationality.

[3] **ID.—TAXATION—UNEQUAL BURDENS.**—Tax laws that avowedly lay a different and higher burden upon a portion only of all those similarly situated, that is, all those among whom no difference which bears a reasonable and just relation to the matter exists, exempting the remaining portion from the burden, are not "equal laws," and their enforcement would deprive the persons so burdened of the equal protection of the laws guaranteed by the federal constitution.

[4] **ID.—EQUAL PROTECTION OF LAWS—IMPROPER CLASSIFICATION.**—In view of section 1 of the fourteenth amendment of the United States constitution, relative to equal protection of the laws, the classification of the inhabitants of a state, for the purpose of laying a poll tax, into aliens and citizens, the former, but not the latter, being taxed, is not a proper classification, and is forbidden by that section.

**APPLICATION** for Writ of Habeas Corpus to discharge petitioner held in custody for failure to register under the alien poll tax law. Petitioner discharged.

The facts are stated in the opinion of the court.

M. A. Thomas, Albert H. Elliot and Guy C. Calden for Petitioner.

U. S. Webb, Attorney-General, for Respondent.

**ANGELLOTTI, C. J.**—The petitioner, an alien male inhabitant of the state of California of the age of about forty-eight years, and a citizen of the United States of Mexico, is held in custody by the chief of police of the city and county of San Francisco under a complaint charging him with failure to register as required by the terms of the act known as the alien poll tax law of 1921, discussed in the

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4. Constitutionality of poll tax as affected by exemptions therefrom, note, 13 L. R. A. (N. S.) 901.

opinion filed in the *Matter of Terui, on Habeas Corpus, ante*, p. 20, [17 A. L. R. 630, 200 Pac. 954]. His case is the same as that of Terui in all material respects, except that he claims no protection under any treaty. It is said by his counsel that there is no treaty provision in any treaty between the United States and the United States of Mexico that affords protection against such discrimination against resident aliens in the matter of taxation as is created by the Alien Poll Tax Act. His sole claim is that this act is void as to all alien inhabitants of the state, in that it denies to persons within the jurisdiction of the state the equal protection of the laws, in violation of a provision of section 1 of article XIV, amendments to the constitution of the United States. The section referred to is as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, *nor deny to any person within its jurisdiction the equal protection of the laws.*" (Italics are ours.)

It is upon the portion of this section that we have italicized that the claim of petitioner is based.

All that we have said with relation to this legislation (the Alien Poll Tax Act of 1921) in our opinion in the Terui case is applicable in this case and need not be repeated here, further than to say that the law was enacted solely in the exercise of the power of taxation for the purpose of raising revenue for state purposes, containing no provision whatever attributable to the exercise of the police power of regulation, and that it imposes on alien inhabitants of the state between certain ages, solely because of their alien character, a tax different in kind from and additional to the taxes required to be paid by all inhabitants, citizens, and aliens alike. No such tax or its equivalent is imposed by our laws on any except alien inhabitants. The law thus imposes an additional burden in the matter of taxation upon such aliens solely because of their alien character, and in this way discriminates against them.

[1] This being the situation, in view of the decisions of the supreme court of the United States, there is no escape

from the conclusion that the alien poll tax law cannot be enforced, for the reason that by its enforcement the state of California would deny to persons within its jurisdiction the equal protection of its laws, in violation of the provision of section 1 of the fourteenth amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

[2] It is settled that the word "person" as used in this amendment includes aliens. It was said in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, [30 L. Ed. 220, 6 Sup. Ct. Rep. 1064, 1070, see, also, Rose's U. S. Notes]: "The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality." The rights of subjects of the emperor of China were here being discussed. In *Truax v. Raich*, 239 U. S. 33, [Ann. Cas. 1917B, 283, L. R. A. 1916D, 545, 60 L. Ed. 131, 36 Sup. Ct. Rep. 7, see, also, Rose's U. S. Notes], decided November 1, 1915, the rights of an alien who was a citizen of Austria and resident of the state of Arizona were involved. The supreme court, speaking through Mr. Justice Hughes, said (239 U. S. 39, [Ann. Cas. 1917B, 283, L. R. A. 1916D, 545, 60 L. Ed. 131, 36 Sup. Ct. Rep. 9]): "Upon the allegations of the bill it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union. Being lawfully an inhabitant of Arizona, the complainant is entitled under the fourteenth amendment to the equal protection of its laws. The description—'any person within its jurisdiction'—as it has frequently been held, includes aliens." The court then quoted approvingly the portion of the opinion in *Yick Wo v. Hopkins*, *supra*, that we have quoted above. (See, also, *Fraser v. McConway*, 82 Fed. 257.) Petitioner, therefore, though an alien inhabitant of California, is by

this provision of the federal constitution guaranteed the equal protection of the laws of California.

The meaning of "the equal protection of the laws" thus guaranteed by the federal constitution to every person within the jurisdiction of a state is not left in doubt by the decisions in so far as such an act as the one here involved is concerned. In *Yick Wo v. Hopkins*, *supra*, it is said that "the equal protection of the laws is a pledge to the protection of equal laws." This was approvingly quoted in *Truax v. Raich*, *supra*. In *Barbier v. Connolly*, 113 U. S. 27, 31, [28 L. Ed. 923, 5 Sup. Ct. Rep. 357, 359, see, also, Rose's U. S. Notes], the supreme court of the United States declared that it was undoubtedly intended thereby "that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; *that no greater burdens should be laid upon one than are laid upon others in the same calling and condition,*" etc. (Italics ours.) As is shown by the opinion in *Yick Wo v. Hopkins*, *supra*, the legislation enacted by Congress for the enforcement of the amendment, popularly known as the civil rights statutes, declared that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens *and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.*" (Italics ours.) What is said in *Barbier v. Connolly*, *supra*, and the federal statute just quoted sufficiently shows the subject matter as to which the alien inhabitant is given by the constitution "a pledge of the protection of equal laws," laws free from discrimination based solely on his alien character. Stated very generally, the requirement is for equal protection and security for all,

citizens and aliens alike, under like circumstances, in the enjoyment of their personal and civil rights, and in the imposition of burdens, such as penalties, taxes, etc. As is stated in the opinion in *Truax v. Raich*, *supra*, the constitutional guaranty, in so far as an alien is concerned, has no application to laws of a state relating to such matters as the regulation or distribution of the public domain, or of the common property or resources of the people of the state, or, it is suggested, laws relating to the devolution of the real property therein. (See *Truax v. Raich*, 239 U. S. 39, 40, [Ann. Cas. 1917B, 283, L. R. A. 1916D, 545, 60 L. Ed. 131, 36 Sup. Ct. Rep. 7].) But that it does guarantee the alien "equal laws" in the matter of the imposition of such burdens on him and his property as taxes seems clear. No question of discriminatory taxation laws was directly involved in the decisions of the supreme court that we have cited, but the rule of these decisions is clearly applicable to such a case. In *The Railroad Tax Cases*, 13 Fed. 722, Justice Field, in his opinion in the circuit court, said: "The fourteenth amendment to the constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive anyone within its jurisdiction of the equal protection of the laws. . . . Unequal exactions in every form, or under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid." (See, also, *Fraser v. McConway etc. Co.*, 82 Fed. 257; *Juniata Limestone Co. v. Fagley*, 187 Pa. St. 193, [67 Am. St. Rep. 579, 42 L. R. A. 442, 40 Atl. 977].) This is so clearly true, in view of the general principles declared by the United States supreme court in the cases we have cited, as not to require discussion. [3] Tax laws that avowedly lay a different and higher burden upon a portion only of all those similarly situated, that is, all those among whom no difference "which bears a reasonable and just relation" to the matter exists (*Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 155, [41 L. Ed. 666, 17 Sup. Ct. Rep. 255, 257, see, also, Rose's U. S. Notes]), exempting the remaining portion from the burden,

are not "equal laws," and their enforcement would deprive the persons so burdened of the equal protection of the laws. We do not see how this can be fairly questioned.

That the act does this very thing is clear. The sole distinction between the male inhabitants of California so burdened with the poll tax and those not so burdened, in so far as all matters material to imposition of the tax is concerned, is that the former are aliens and the latter citizens. This is the sole basis of the attempted classification. As was said in *Gulf etc. Ry. Co. v. Ellis, supra*, (165 U. S. 165, [41 L. Ed. 666, 17 Sup. Ct. Rep. 261, see, also, Rose's U. S. Notes]): "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." [4] In the case at bar the only difference is such that, in view of the language of section 1 of the fourteenth amendment, relative to equal protection of the laws, it cannot in the nature of things constitute a proper basis for classification, for the plain effect of that section is to forbid any distinction in such a matter as this based on that fact alone.

It follows from what we have said that the alien poll tax law must be held to be in violation of the terms of section 1 of the fourteenth amendment of the constitution of the United States, which by the express terms of section 2 of article VI thereof is declared to be "the supreme law of the land," binding on the judges in every state, "anything in the constitution or laws of any state to the contrary notwithstanding." It is therefore ineffective for any purpose.

The petitioner is discharged from custody.

Shaw, J., Lennon, J., Wilbur, J., Shurtleff, J., Sloane, J., and Lawlor, J., concurred.

[S. F. No. 9428. In Bank.—September 13, 1921.]

In the Matter of the Estate of SUZANNE AUFRET, Deceased. MATHURIN MARIE LE RALLE, Respondent, v. THE STATE OF CALIFORNIA, Appellant.

- [1] ESTATES OF DECEASED PERSONS—SUCCESSION—NONRESIDENT ALIEN HEIRS—PETITION FOR DISTRIBUTION—INSUFFICIENT ANSWER.—An answer to a petition for distribution to certain heirs of the estate of a deceased person does not state facts sufficient to show that the petitioners are not entitled to the estate under the provisions of sections 672 and 1404 of the Civil Code, providing that nonresident alien heirs must make their claim within five years after the death of the decedent, where the answer does not aver that the petitioners were not residents and citizens of California, or of the United States, at the time of decedent's death, and ever since, until the time of the filing of the answer, since if they were such residents or citizens at the time of the death of the decedent, they would immediately succeed to the title, free from the condition expressed in section 1404, and no claim on their part would be necessary to enable them to take by succession.
- [2] APPEAL — JUDGMENT — FINDINGS — PRESUMPTION.—A judgment or decree cannot be reversed for want of a finding, where the answer does not set forth any defense, as error is never presumed, and all intendments are in favor of the judgment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Thos. F. Graham, Judge. Affirmed.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and Frank L. Guarena, Deputy Attorney-General, for Appellant.

S. J. Brun and J. A. Fairchild for Respondent.

SHAW, J.—This is an appeal on behalf of the state of California from a decree of distribution of the estate of Suzanne Aufret, deceased, distributing the property to the respondents, Mathurin Marie Le Ralle, Marie Louise Bichelot, and Marie Ange Bichelot, in certain proportions not material to the inquiry on this appeal,



The record on appeal consists of the following documents:

1. The petition of the respondent, Mathurin Marie Le Ralle, asking distribution of the estate to the two respondents as heirs at law of the decedent. It alleges the death of the decedent on May 18, 1908; that the estate was in San Francisco and was personalty; that the public administrator had been appointed administrator of the estate and had duly administered the same; that his accounts had been settled, showing a balance of \$2,126.41, in money; that the respondents were the heirs of the decedent, by reason of their relationship to her as set out in the petition, stating their respective shares and rights therein; and that they were residents of France at the time of the filing of said petition on March 18, 1919. It does not aver that they were aliens or that they ever were subjects of France.

2. An answer to the petition by the attorney-general, on behalf of the state. It alleges that the aforesaid respondents are all citizens and residents of the republic of France; that the aforesaid petition for distribution was filed and the claim of succession to the said estate made more than five years after the death of the decedent; and that neither of the respondents had appeared and claimed such estate by succession within five years from the death of the said decedent. It asks that the petition be denied and that the property be distributed to the state.

3. The decree of distribution appealed from. It recites that on the hearing of the petition evidence was introduced by the respective parties; that the decedent was a resident of Algiers, Africa, at the time of her death, which occurred on May 18, 1908; that the estate was ready for distribution and consisted of the sum of money above stated; that the respondents were her next of kin entitled to succession and that at the time of her death the respondent, Le Ralle, was and "still is" a resident and subject of France; that one Marie Anne Le Ralle Bichelot, a niece of decedent, was at the death of the decedent a resident and subject of France; that said Marie Anne Le Ralle Bichelot died on March 17, 1913, and was then a resident and subject of France and left surviving her the respondent Marie Ange Bichelot, her husband, and the respondent Marie Louise Bichelot, her child, "both of whom *are* residents and subjects of France." It does not state that respondent Le Ralle was a resident or citizen of



France at any time between the date of May 18, 1908, and the date of the decree, to wit, September 29, 1919, or that the deceased niece was not a resident of this country from the time of the death of the decedent Aufret until the date of her own death, or that her surviving husband and child aforesaid were not residents and citizens of this country at all times prior to the date of the decree. Thereupon it ordered distribution of the estate to them as aforesaid.

There was no recital or finding upon the subject of their having appeared and claimed the estate within five years after the death of said decedent, except the recital that they were entitled to succession. No bill of exceptions or other statement showing the evidence introduced and proceedings taken at the trial appears in the record. No findings or decision in writing were signed or filed, other than the aforesaid recitals in the decree of distribution.

[1] The answer does not state facts sufficient to show that the respondents are not entitled to the estate under the provisions of our Civil Code on the subject. Section 672 declares that "If a nonresident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred." Section 1404 provides, further, that aliens may take by succession the same as citizens: "but no nonresident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession." The answer does not aver that the respondents, or either of them, were not residents and citizens of California, or of the United States, at the time of the death of Suzanne Aufret in 1908, and ever since, until the time of the filing of the answer in the year 1919. If they were such residents or citizens at the time of the death of the decedent, they would immediately succeed to the title, free from the condition expressed in section 1404, and no claim on their part would be necessary to enable them to take by the succession. On the face of the petition and answer thereto, since the relationship was not disputed, the court below was authorized to make the distribution to the respondents, as it did. In our consideration of the case, since the answer stated no defense, it may be entirely disregarded.

The recitals of the decree do not preclude the respondent from taking the succession. As to respondent Le Ralle, the

recitals do not say that he did not become a resident of this country immediately after the death of the decedent and remain such resident until the date of the decree, or that he did not become a citizen of this country in that interval, or that he did not appear within the first five years and claim the succession. As to the deceased niece, the recitals do not say that she did not appear and claim the succession before her death, or that her successors, her husband and child, did not do so after her death. The recitals, therefore, do not warrant the conclusion that the decree was erroneous.

[2] We know of no decision to the effect that a judgment or decree for a petitioner may be reversed for want of a finding, where the answer does not set forth any defense. Error is never presumed. All intendments are in favor of the judgment. In the absence of the evidence, it will be presumed that there was proof to the effect that the respondents had, within five years after the death of the decedent, appeared and claimed the succession to the property. It has been said that such "claim may be *in pais*, as by taking possession of the property, or conveying or contracting with respect to it." (*State v. Smith*, 70 Cal. 156, [12 Pac. 123].) We can perceive no reason why this statement is not a correct interpretation of the statute. But even if it were held that the claim must be manifested by some formal document of record or on file in the proceedings in probate for the settlement of the estate, the result would be the same, for, in view of the decree and the lack of any evidence to show that such claim was not so shown, we must presume that it was so manifested.

The decree is affirmed.

Sloane, J., Wilbur, J., Lawlor, J., Shurtleff, J., Lennon, J., and Angellotti, C. J., concurred.

[L. A. No. 6117. In Bank.—September 13, 1921.]

**NORTHWESTERN MUTUAL FIRE ASSOCIATION (a Corporation), Respondent, v. PACIFIC WHARF & STORAGE COMPANY (a Corporation), Appellant.**

- [1] **PLEADING—ISSUES—EVIDENCE—APPEAL.**—It is settled law under the decisions of this state that where a case is tried without objection upon a showing of facts not pleaded, but supported by the evidence and covered by the findings, objection will not be considered on appeal that the pleadings do not present the issue.
- [2] **ACTION FOR DAMAGES—DESTRUCTION OF LUMBER BY FIRE—NOTICE OF NONLIABILITY.**—Where a wharf and storage company notified a lumber company that there would be a strike of the longshoremen and wharf handlers on a certain date, that it would not receive a shipment of lumber for storage after that date, except subject to its not assuming any responsibility for delivery, or loss, or damages, or theft, or any cause whatever of that nature, until the strike was over and it was in a position to handle the same, and, with said understanding, shortly after the date of the strike the lumber was removed from a steamer by the master and piled in the rough upon the wharf for the express purpose of having the same stored by the wharf and storage company, the terms of the notice of nonassumption of liability were amply sufficient to cover a loss of the lumber by fire.
- [3] **BAILMENTS — NEGLIGENCE — NONLIABILITY — CONTRACT FOR.**—A depository or bailee for hire in the course of his ordinary business cannot relieve himself by contract or notice from responding in damages for loss arising from his own negligence, or that of his agents or servants.
- [4] **ID.—RIGHT TO REFUSE GOODS FOR STORAGE EXCEPT ON CONDITIONS.** A wharf and storage company, anticipating a strike of longshoremen and wharf handlers, and having reason to believe that its facilities for handling business would be so disturbed as to render it unsafe to assume the usual risks, has the right to refuse to accept goods in storage except on condition of being released from liability for damages that might in any way be traceable to such disorganized conditions.
- [5] **ID.—DEGREE OF CARE REQUIRED.**—Nothing short of gross or wanton negligence would make a wharf and storage company responsible for the loss of lumber placed on its wharf with the express understanding that it would be relieved from all liability, a strike being threatened which would disorganize its usual business, and that the owner of the lumber would take all of the risks if permitted to pile its lumber there awaiting storage.

[6] **ID.—CONTRACT FOR NONLIABILITY—PUBLIC POLICY—VALIDITY OF CONTRACT.**—A contract between a wharf and storage company and a lumber company by which the former permitted the latter to place its lumber on the wharf of the former for the purpose of storing it, upon the express understanding that, in view of the fact that a strike of longshoremen and wharf handlers was threatened which would disorganize the business, the former should not be in any way liable, is not against public policy, but the contract is binding upon the parties and operates to relieve the storage company from negligence of its employees while in its service.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Dana R. Weller, Judge. Reversed.

The facts are stated in the opinion of the court.

Goodwin & Mortgage and W. N. Goodwin for Appellant.

Hahn & Hahn for Respondent.

**SLOANE, J.**—This is an appeal from a judgment awarding damages to plaintiff for loss by fire of lumber stored on defendant's wharf.

The plaintiff, an insurance company, sues on its own and the assigned claims of other insurance companies, arising upon subrogation to the rights of the owners of the lumber, represented by the Union Lumber Company, a corporation, from having paid the losses to the owners upon policies of insurance thereon.

The defendant, the owner of the wharf, and engaged in the wharfage and storage of lumber, disputes this liability for the loss in question on the ground that it was relieved from such liability by reason of a special contract with the owners of the lumber whereby defendant accepted the deposit of this consignment of lumber subject to the owner's risk.

It is true that this issue is not expressly raised by the pleadings. The complaint avers that "At all times herein mentioned defendant has maintained and operated, and does now maintain and operate at South San Pedro, California, a storage wharf for hire," and, that "on the eighteenth day of August, 1916, the Union Lumber Company, a corporation, was the owner of certain lumber and timber products which were there stored and situate upon the wharf

and premises maintained and operated by defendant at East San Pedro, California, as a wharf and premises for hire . . . that on said date said lumber and timber products were in the care and custody of defendant for a consideration, awaiting orders from its owner as to its disposition and removal therefrom," and was damaged by fire through defendant's negligence.

The defendant contents itself with simply denying "that at the time or times in said complaint mentioned, defendant has maintained or operated, or does now maintain or operate at San Pedro, California, a storage wharf for hire," or that on the eighteenth day of August, 1916, the lumber in said complaint described was "stored upon the wharf or premises maintained or operated by defendant." It also denies that the loss occurred through defendant's negligence, but there is no reference to the special defense that the lumber was placed on the wharf at the risk of the owner.

It is not the fact, however, as suggested by respondent, that this defense was raised for the first time on appeal. It was raised in the evidence and by the findings of the trial court. Evidence as to the special contract under which it is claimed that this lumber was stored on defendant's wharf, with a waiver of liability against defendant, was introduced by defendant without objection and the trial court specifically finds upon the issue thus raised.

[1] It is settled law under the decisions of this state that where a case is tried without objection upon a showing of facts not pleaded, but supported by the evidence and covered by the findings, objection will not be considered on appeal that the pleadings do not present the issue. (*Klopper v. Levy*, 98 Cal. 525, [33 Pac. 444]; *King v. Davis*, 34 Cal. 100; *Barbour v. Flick*, 126 Cal. 628, 632, [59 Pac. 122]; *Rudel v. County of Los Angeles*, 118 Cal. 281, [50 Pac. 400]; *Fernandez v. Western Fuse etc. Co.*, 34 Cal. App. 420, 423, [167 Pac. 900].) Not only was the evidence as to this waiver of liability introduced without objection, but the plaintiff participated in its introduction by cross-examining the witness as to the agreement. Had objection been made, the pleading could properly have been amended to conform to the facts as testified to.

The finding of the trial court upon this issue was that before the lumber was received upon the wharf the defendant company notified said Union Lumber Company as follows: "That there would be a strike of the longshoremen and the wharf handlers June 1st; that it would not receive said shipment of lumber after June 1, 1916, except subject to its not assuming any responsibility for delivery, or loss, or damages, or theft, or any cause whatever of that nature, until the strike was over and it was in a position to handle the same. That with said understanding and shortly after June 1, 1916, said lumber and timber products were removed from said steamer 'Noyo' by the master of said steamer and piled in the rough upon defendant's said wharf for the express purpose of having the same stored by defendant."

[2] The evidence clearly supports this finding that such notice was given and that the lumber was landed upon the wharf with that understanding. The terms of the notice of nonassumption of liability were amply sufficient to cover the loss by fire complained of. The only question open to discussion is the right of the defendant to exempt itself from liability for the negligence of its own employees.

[3] The general rule that a depositary or bailor for hire in the course of his ordinary business cannot relieve himself by contract or notice from responding in damages for loss arising from his own negligence or that of his agents or servants may be conceded. (*Railroad v. Lockwood*, 17 Wall. (84 U. S.) 357, [21 L. Ed. 627, see, also, *Rose's U. S. Notes*]; *Minnesota Butter & Cheese Co. v. St. Paul Cold-Storage etc. Co.*, 75 Minn. 445, [74 Am. St. Rep. 515, 77 N. W. 977]; *Dieterle v. Bekin*, 143 Cal. 683, [77 Pac. 664].)

[4] But in this case the owner had notice that the defendant was not accepting the responsibility of storing the lumber in the ordinary course of its business, but under special conditions. It was anticipating a strike, which actually occurred, and it had reason to believe that its facilities for handling business would be so disturbed as to render it unsafe to assume the usual risks. It, in effect, notified the plaintiff that it had suspended its usual line of business and would only accept the lumber upon its wharf at the owner's risk. Even so, an individual bailee might not be

permitted to excuse himself from damages caused by his personal want of ordinary care, but in the case of a strike, with its attendant disorganization of discipline and system, it would be strange indeed if an employer, and particularly a corporation which can only act through its employees, could not refuse to accept goods in storage except on condition of being released from liability for damages that might in any way be traceable to such disorganized conditions.

It is true in this instance that the loss by fire was not the direct result of the strike. It was contributed to, at least, by failure to construct an oil tank maintained on the wharf of defendant, as required by an ordinance of the city of Los Angeles, but the immediate cause of the fire was the negligence of one of defendant's employees in operating the machinery to which this oil tank was attached.

To what extent the conditions brought about by the strike may have contributed to such want of care of the employee cannot be determined, but it was a contingency to be anticipated, and which the defendant had a right to protect itself from by a special contract as to the liability assumed.

This case comes to us on rehearing from the district court of appeal, and we accept the conclusions of that court, and the reasoning on this point presented in the following language:

"With reference to the lumber destroyed by fire, it is evident that the defendant did not receive it as a wharfinger, nor was it received as a depositary, gratuitous or for hire, so long as the lumber remained on the wharf under the agreed conditions herein.

"But for comparison, the degree of care to be exercised by a depositary, and his liability for loss or damage to the thing stored will be stated. The code provides for the degree of care of limitation of liability in case of a deposit. If for hire, the depositary must use at least ordinary care for the preservation of the thing deposited (sec. 1852, Civ. Code); and if gratuitous only, at least slight care (sec. 1846, Civ. Code). 'No warehouseman or other person doing a general storage business is responsible for any loss or damage to property by fire while in his custody, if he exercises reasonable care and diligence for its protection and preservation.' (Sec. 1858e, Civ. Code.) [5] If such be



the rules by which the liability of the depositary is measured in the event of the destruction of the deposit, it would seem that nothing short of gross or wanton negligence would make a defendant responsible for the loss of the lumber placed on the wharf with the express understanding that the defendant would be relieved from all liability, and that the Union Lumber Company would take all the risks if permitted to pile its lumber there awaiting storage. From the foregoing testimony, the strong inference is that the Union Lumber Company had control of the lumber until piled and stored in the yard back of the wharf. Then the situations of the parties were that of contracting parties dealing at arm's-length. The defendant refused to receive the lumber in the usual way and informed the Union Lumber Company of the danger and risk of leaving this lumber even on the wharf during the strike. It permitted the Union Lumber Company to pile the lumber on its property under the express agreement that it, the defendant, would be under no obligation for its loss or damage, and that Union Lumber Company would take all the risk. When this agreement was made the defendant realized the dangers attending the strike which it knew would surely take place on June 1st. The strike did come and was serious. It was necessary to place watchmen on duty around the property. Even then there was violence and threats made against the defendant. Some of its 'employees were beaten up rather badly.' Such a contract, under existing conditions, not to take any risk for any loss or damage to the lumber from whatever cause was not only within the rights of the defendant, but was an act of good business judgment. At the time the contract was made, the Union Lumber Company was told by the defendant that it could leave the lumber on board ship, or it could take its lumber 'back to Redondo or take it back where it came from.' By placing it on the wharf in the face of the strike, and the conditions under which it was permitted to place it there, the Union Lumber Company did not use business prudence or ordinary care. (Sec. 1714, Civ. Code.)

"Even if the defendant did not exercise ordinary care in the preservation of said lumber, it violated no state law as a depositary. It had not stored the lumber and was, therefore, independent of the contract, not liable as a de-



positary. In making its contract with the Union Lumber Company, it violated no law against public policy. The public had nothing to do with the transaction, was not in any way interested in the matter. The transaction was a common-sense mutual arrangement between two competent contracting corporations concerning their private affairs.

[6] Such a contract is not only not against public policy, but it is binding upon the parties and will operate to relieve the defendant from the negligence of its employees while in its service. (*Stephens v. Southern Pac. Co.*, 109 Cal. 86, [50 Am. St. Rep. 86, 29 L. R. A. 751, 41 Pac. 783].) 'The authorities all agree that the contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society.' (*Griswold v. Illinois Cent. R. Co.*, 90 Iowa, 265, [24 L. R. A. 647, 57 N. W. 843].) 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract, and that every contract, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by the courts of justice. Therefore, you have this paramount public policy to consider—that you are not likely to interfere with this freedom of contract.' (3 Am. & Eng. Ency. of Law, old ed., note 3, p. 875.)

"It should be constantly borne in mind that this was not a unilateral contract on the part of the defendant. The Union Lumber Company, by accepting the conditions upon which it was permitted to rough pile the lumber on the defendant's premises, accepted those conditions and affirmatively agreed to relieve defendant from all risks. The defendant and the Union Lumber Company freely contracted with all of the possible dangers in mind which might attend a tie-up of a large business by means of a strike of a comparatively large body of employees. The contract was to the effect that the defendant would not be responsible for the delivery, or loss or damage of this lumber. The terms of the agreement are broad enough in meaning to guard the defendant against all loss or damage by fire or other cause attending a general strike of its em-

ployees, including any loss or damage caused by reason of disturbed conditions, in consequence of, as a sequence to, a strike; shortage of help, overwork and overwrought remaining employees, interruption of the ordinary conduct of the business, a want of ordinary and usual care of employees in doing their work under stress and disturbance and threats; for lack of efficiency in coping with fire or other destructive agencies because of the condition of or scarcity of employees."

In the light of the conclusion reached by the court of appeal and by this court that the defendant was released by its contract from liability for the damage sued for, and the trial court having found that the lumber was accepted upon defendant's wharf in pursuance of said agreement and understanding that it was so received at the owner's risk, the judgment is reversed, with directions to the lower court to amend its conclusions of law in accordance herewith, and render judgment for the defendant.

Shaw, J., Wilbur, J., Shurtleff, J., Lawlor, J., Lennon, J., and Angellotti, C. J., concurred.

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[L. A. No. 6802. In Bank.—September 13, 1921.]

**ARCHIBALD S. RALPH, Respondent, v. JOSEPH ANDERSON, Appellant.**

- [1] **CHOSE IN ACTION—ASSIGNMENT—PARTIES.**—An assignee of a chose in action may bring suit thereon in his own name.
- [2] **ID.—COLLISION OF AUTOMOBILES—CAUSE OF ACTION FOR NEGLIGENCE—ORAL ASSIGNMENT.**—Since there is no statutory provision requiring an assignment of a claim for damages to an automobile, alleged to have resulted from negligence in a collision, to be in writing, parol evidence of the transfer is admissible.
- [3] **ID.—WITNESSES—TESTIMONY OF ASSIGNOR.**—In a suit by the assignee upon a claim so assigned, the oral testimony of the assignor himself to the effect that he has transferred his claim is sufficient to bind the assignor and support a finding that an assignment has been made.
- [4] **ID.—PARTIES—COLLATERAL AGREEMENT WITH REFERENCE TO RECOVERY.**—Provided the assignment in such a case, whether verbal

or written, is absolute so as to vest the apparent legal title in the assignee, the latter is entitled to sue in his own name, whatever arrangements may have been made between him and the assignor respecting the proceeds, as the debtor is completely protected by the assignment.

[5] ID.—INTEREST OF THIRD PARTY IN CLAIM—EVIDENCE—ADMISSIBILITY OF.—In an action by the assignee upon an assigned claim for damages to an automobile alleged to have occurred by defendant's negligence, evidence of the interest in the claim of an insurance company in which both the assignor and assignee were insured is admissible subject to plaintiff's connecting this interest with the present action by proof of his authorization to sue.

[6] ID.—EVIDENCE—APPEAL.—In an action upon an assigned claim where the trial court found, upon ample evidence, that plaintiff sustained the burden of proving a direct assignment of the claim, defendant cannot upon appeal raise objection that certain evidence is lacking when his attorneys are responsible for its omission, nor can he complain that the case was tried upon an erroneous theory when the court and parties were led into the acceptance of that theory by defendant's own counsel.

APPEAL from a judgment of the Superior Court of Orange County. Z. B. West, Judge. Affirmed.

The facts are stated in the opinion of the court.

David R. Faries, Ivan Kelso and Head & Rutan for Appellant.

Scarborough, Forgy & Reinhaus for Respondent.

LENNON, J.—The automobile of one H. O. Henderson was damaged in a collision with the automobile of Joseph Anderson. Archibald S. Ralph instituted the present action against said Joseph Anderson for damages, alleging that the collision was the result of defendant Anderson's negligence and that said H. O. Henderson duly assigned, sold, and transferred his claim against the said defendant as sued for in this action "to the plaintiff herein [Ralph], who is now the owner and holder thereof." Judgment having been rendered in favor of the plaintiff, defendant appeals upon the ground that the evidence is insufficient to show that plaintiff Archibald S. Ralph is the owner of the claim sued upon or is authorized to bring suit in his own name and, therefore, that a judgment in plaintiff's favor would not protect defendant against a subsequent suit upon

the claim by the real owner. This is the only question raised upon the appeal.

[1] If there is sufficient evidence to support the finding that the owner of the claim assigned the same to plaintiff, the judgment in plaintiff's favor must be affirmed, for it is the settled rule that an assignee of a chose in action may bring suit thereon in his own name. (*Wiggins v. McDonald*, 18 Cal. 126; *Gradwohl v. Harris*, 29 Cal. 150; *Reios v. Mardis*, 18 Cal. App. 276, [122 Pac. 1091].) Upon the assignment phase of the case, Mr. Henderson, the owner of the damaged automobile, was called as a witness for the plaintiff. The record discloses that he testified (1) that he assigned any claim that he might have against the defendant to Archibald S. Ralph, the plaintiff; (2) that the assignment was made shortly after the accident; (3) that the assignment was oral and consisted of a direction to Ralph to collect the damages from the defendant. [2] There was no attempt to prove that the assignment was written, and, since there is no statutory provision requiring an assignment of such a claim to be in writing, parol evidence of the transfer was admissible. (*Humboldt Milling Co. v. Northwestern Pac. Ry.*, 166 Cal. 175, [135 Pac. 503]; *Shoenhair v. Jones*, 33 Cal. App. 545, [165 Pac. 971]; Civ. Code, sec. 1052.) [3] In a suit by the assignee upon a claim so assigned, the oral testimony of the assignor himself to the effect that he has transferred his claim is sufficient to bind the assignor and support a finding that an assignment has been made. (*Bruno v. Severini*, 34 Cal. App. Dec. 371, 196 Pac. 501.) The testimony of the original owner of the claim that he had assigned the same to the plaintiff in the instant case by oral assignment was, therefore, sufficient proof of an assignment.

It is true that it also appears from the testimony of both the assignor Henderson and the assignee Ralph that Henderson was, at the time of the collision, insured in the Automobile Indemnity Exchange of Orange County, an inter-insurance association organized pursuant to statutory provisions (Stats. 1917, p. 1170; amended Stats. 1919, p. 1270), of which plaintiff Ralph was the attorney in fact and manager. And it may further be gathered from the testimony that it was understood between Henderson and Ralph that the amount of any judgment collected in this action was

to be turned over to the said indemnity exchange. This agreement restricting the disposition of the proceeds recovered in no way detracts from plaintiff's capacity to sue, for an assignee is not deprived of his right to sue in his own name by the fact that the claim is assigned merely for collection. (*Toby v. Oregon Pac. R. R.*, 98 Cal. 490, [33 Pac. 550].) [4] Provided the assignment, whether verbal or written, is absolute so as to vest the apparent legal title in the assignee, the latter "is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds. The debtor is completely protected by the assignment, and cannot be exposed to a second action brought by any of the parties, either the assignor or other, to whom the assignee is bound to account." (Pomeroy's Code Remedies, 4th ed., sec. 70; *Grant v. Heverin*, 77 Cal. 263, [18 Pac. 647, 19 Pac. 493]; *Ingham v. Weed*, 5 Cal. Unrep. 645, [48 Pac. 318].)

However, defendant advances the theory that it is apparent from the evidence adduced upon the whole case that the Automobile Indemnity Exchange of Orange County, and not the plaintiff Ralph, is the assignee of the claim and is the real party at interest. It is pointed out, in support of this contention, that the evidence shows that Henderson was insured in the inter-insurance company above mentioned and that the company has become subrogated to Henderson's claim against defendant by reason of having assumed charge of and paid for some of the repairs to the Henderson automobile, and, furthermore, that, aside from the right arising from subrogation, the actual assignment testified to by Henderson was not an assignment to Ralph individually, but solely in his capacity as agent for the said exchange. It is, therefore, urged that the present action should not have been prosecuted by plaintiff in his individual capacity. (*Swift v. Swift*, 46 Cal. 266; *Chin Kem You v. Ah Joan*, 75 Cal. 124, [16 Pac. 705].)

Upon the trial of the case, counsel for defendant repeatedly and successfully objected to all questions of counsel for plaintiff tending to bring out the interest which the said Automobile Indemnity Exchange possessed in the claim sued upon. Objection was likewise made to plaintiff's attempt to prove an authorization from the inter-insurance company to plaintiff to bring suit upon the claim. [5]

Evidence of the inter-insurance company's interest in the claim was admissible, subject, of course, to plaintiff connecting this interest with the present action by proof of his authorization to sue. (*Bauer v. State*, 144 Cal. 740, [78 Pac. 280]; *Ferguson v. McBean*, 4 Cal. Unrep. 429, [35 Pac. 559].) However, as a result of the attitude of defendant's counsel, plaintiff was compelled to try the case upon the theory of a direct assignment of the claim to plaintiff subject to a collateral agreement concerning the disposition of the proceeds. [6] The trial court having found, upon ample evidence, that plaintiff sustained the burden of proving such a direct assignment, defendant cannot upon appeal raise objection that certain evidence is lacking when his attorneys are responsible for its omission, nor complain that the case was tried upon an erroneous theory when the court and parties were led into the acceptance of that theory by defendant's own counsel. (*Powell v. Ross*, 4 Cal. 197; *Merrill v. Kohlberg*, 29 Cal. App. 382, [155 Pac. 824]; *Harp v. Harp*, 136 Cal. 421, [69 Pac. 28].)

It is contended that the court erred in sustaining objections to questions put to the witness H. O. Henderson by defendant's counsel as to whether or not he (Henderson) had assigned the claim in question to the Automobile Indemnity Exchange. The correctness of these rulings need not be investigated, for it appears that the court subsequently overruled the objection of plaintiff's counsel and permitted the witness to answer the following question: "Is it not, Mr. Henderson, a fact, that prior to the filing of this suit you assigned all of your rights, titles, and interests to any claim, cause of action arising out of this accident, if any you had, to the Automobile Indemnity Exchange of the Orange County Automobile Club?" In response, the witness stated, in effect, that the only assignment of the claim made by him was the oral assignment concerning which he had already testified. This question and answer brought forth all the information called for by the questions previously ruled out, and it follows that, if any error was committed, it was not prejudicial to the defendant.

The judgment is affirmed.

Sloane, J., Shaw, J., Wilbur, J., Shurtleff, J., Lawlor, J., and Angellotti, C. J., concurred.

[L. A. No. 6623. In Bank.—September 13, 1921.]

In the Matter of the Estate of THOMAS D. WALL, Deceased. SARAH J. WALL, etc., Appellant, v. J. GEORGE HUNTER, Executor, etc., Respondent.

- [1] **WILLS—UNDUE INFLUENCE—INSUFFICIENCY OF EVIDENCE.**—In a will contest upon the ground of undue influence it must be shown that the undue influence operated upon the mind of the testator at the time of the execution of the will, and where there is not only no evidence of the exercise of influence at or about the time of the execution of the will, but no evidence that at any time any of the parties charged with the exercise of undue influence, other than the attorney who prepared the will, ever addressed themselves in any manner, directly or indirectly, to the deceased in relation to the execution of the will in question, or any other will, and there is no evidence that the attorney exercised any undue influence over the testator, it was proper for the court to withdraw the issue of undue influence from the jury.
- [2] **ID.—PLEADING—DENIALS—SUFFICIENCY OF.**—In a will contest on the ground of undue influence and insanity, where the answer of the executor denied the allegations of the petition, the failure of the heirs charged with undue influence to deny the allegations is of no significance, as the plaintiff could not secure the revocation of the will without overcoming all of the opposition to such revocation, which required proof of all material allegations put in issue by the executor's answer.
- [3] **ID.—EVIDENTIARY MATTERS.**—In such a case it is not necessary to deny evidentiary matters, and the failure to do so does not admit such evidence where the answer specifically denies each and every allegation of the exercise of undue influence upon the testator at the time of, or in connection with, the execution of the will in question.
- [4] **ID.—SMALL BEQUEST TO WIFE—WHEN WILL NOT UNNATURAL—INHARMONY.**—A will is not unnatural because it bequeaths only a small amount to the surviving wife, where the decedent had begun one action for divorce and contemplated another, and letters by the testator, written long before the will was executed, made it plain that he had no affection or regard for his wife; but even if the

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1. Undue influence as affecting wills, notes, 16 *Am. Dec.* 257; 31 *Am. St. Rep.* 670.

4. Unnatural or unreasonable character of will as evidence of undue influence, note, 7 *Ann. Cas.* 894.



will is unnatural, this fact alone would not justify a verdict based upon undue influence.

- [5] **ID.—MOTION FOR JUDGMENT ON PLEADINGS—MATERIAL FACTS PUT IN ISSUE BY ANSWER.**—In a will contest a motion for a judgment on the pleadings is properly denied where all the material facts are put in issue by the answer.
- [6] **ID.—JURY—SPECIAL VENIRE—DISCRETION.**—It is well established that the court has discretion to order a special venire as provided in section 226 of the Code of Civil Procedure, notwithstanding the fact that there are sufficient names in the term trial jury box.
- [7] **ID.—JURORS.**—An order for a special venire for a jury is erroneous where it directs the sheriff to summon twenty-four good and lawful *men* of the county, as by reason of the amendment of 1917 to section 226 of the Code of Civil Procedure the venire should require the summoning of good and lawful *persons*, but such objection will not be considered on appeal where not specifically pointed out to the trial court.
- [8] **ID.—SUMMONING JURY—QUALIFICATION OF SHERIFF.**—A sheriff is not disqualified to summon a jury on the ground that one of the attorneys in the case who was charged with undue influence is also an attorney for a corporation of which the sheriff is a director.
- [9] **ID.—FORM OF JUDGMENT.**—In a will contest, where the judgment after stating that the jury duly rendered their verdict in favor of defendant decrees that the executor recover his costs from plaintiff, the appellant is not injured by the failure to expressly deny her petition for revocation of the probate of the will, although the judgment should have done so.

**APPEAL** from a judgment of the Superior Court of Riverside County. Hugh H. Craig, Judge. Affirmed.

The facts are stated in the opinion of the court.

Lee R. Taylor, Jas. L. King and D. B. Chapin for Appellant.

Adair & Winder for Respondent.

**WILBUR, J.**—This is an appeal by the surviving wife from a judgment sustaining a will in a proceeding for the revocation of the probate of a will instituted by her. The grounds of contest were undue influence and insanity. The issue of insanity was submitted to the jury and a verdict was rendered in favor of the respondent, sustaining the



will. As no substantial evidence of insanity was produced, the verdict of the jury holding the decedent to be sane is not attacked by appellant. The issue of undue influence was withdrawn from the jury on motion of the executor on the ground that there was not sufficient proof of undue influence to go to the jury, and this order withdrawing such issue appellant claims to be erroneous.

The will is charged to have been secured by undue influence of John J. Wall, a brother of the testator and Eliza Smith and Ann McLennan, sisters of the testator, and J. George Hunter and A. H. Winder, who were nominated as executors of the will and were subscribing witnesses thereto. A. H. Winder was consulted by the deceased as his attorney and drew the will in that capacity. J. George Hunter had nothing to do with the execution of the will except to act as witness thereto at the request of the testator. There is no evidence that either of these parties exercised any influence whatever over the testator in connection with the execution of the will. There is no evidence whatever that the brother or sisters in any manner participated in or had anything to do with, or exercised any influence over or held any communication with, the testator in relation to the execution of the will. [1] Undue influence must operate upon the mind of the testator at the time of the execution of the will. Not only is there no evidence of the exercise of influence at or about the time of the execution of the will, but also there is no evidence that at any time any of the parties charged with the exercise of undue influence, other than the attorney who prepared the will, ever addressed themselves in any manner, directly or indirectly, to the deceased in relation to the execution of the will in question or any other will, and there is no evidence that the attorney exercised any undue influence over the testator. It follows that the order of the court withdrawing the issue of undue influence from the jury was proper.

However, before leaving this branch of the case, we will state in a general way the position of the appellant, the plaintiff in the court below, and indicate the answer to her contentions. First: The appellant relies upon the fact that certain allegations of her petition were not denied by some of the heirs charged with undue influence. The situation

in that regard is as follows: Upon the filing of the plaintiff's petition for the revocation of the will a citation was issued and served as required by section 1328 of the Code of Civil Procedure, directed to the executor of the will and to all the legatees and devisees mentioned in the will and heirs residing in the state, requiring them to appear and show cause why the probate of the will should not be revoked. The only answer filed to the petition was that of the executor, which he filed on behalf of himself and all other persons who had appeared in the proceeding. The answer of the executor denied the allegations of the petition now relied upon by the appellant in support of her claim that undue influence was established, but she contends that the failure of the heirs charged with undue influence to deny the allegations of the petition amounted to an admission of the truth of such allegations. [2] This claim and others based upon it may be dismissed from further consideration upon calling attention to the fact that as between the executor and the plaintiff the facts alleged and relied upon by the plaintiff were put in issue, and that therefore the failure of the heirs to deny such allegations is of no significance whatever. The plaintiff could not secure the revocation of the will without overcoming all of the opposition to such revocation and this required her to prove all the petitioner's material allegations put in issue by the executor.

The answer of the executor directly denied the allegation of insanity and directly denied the exercise of undue influence by any of the parties charged therewith. The petition alleged many matters of an evidentiary nature, such, for instance, as the fact that some of the brothers and sisters had at previous times secured property from the testator without consideration and by the exercise of undue influence. [3] It was not necessary to deny these evidentiary matters, and the failure to do so did not admit such evidence where the answer specifically denied each and every allegation of the exercise of undue influence upon the testator at the time of or in connection with the execution of the will in question. (*Racouillat v. Rene*, 32 Cal. 450; *Wormouth v. Hatch*, 33 Cal. 121; *Jones v. City of Petaluma*, 36 Cal. 230, 233.) For this reason we will not enter into a detailed consideration or discussion of the facts claimed to have been admitted. Most of these, however,

were formally and specifically denied for lack of information and belief by respondent.

It is claimed that the will itself is evidence of undue influence because of its unnatural character. It is true that the will left only one hundred dollars to the wife, but in view of the fact that she alleges that decedent had already begun one action for divorce against her and contemplated another, it is not surprising that she was not left a larger amount. Letters by the testator, written long before the will was executed, make it plain that he had no affection or regard for his wife. [4] The will was not unnatural under the circumstances, but even if it was, this alone could not justify a verdict based upon undue influence. The evidence, considered without the facts erroneously claimed by the appellant to be admitted by the pleadings, falls so far short of constituting substantial or sufficient evidence of undue influence to be presented to the jury that we refrain from further discussion thereof.

The appellant relies upon other alleged errors for a reversal and we proceed to a consideration of those which merit discussion. Plaintiff made a motion for a judgment on the pleadings. [5] In view of the fact that all material facts were put in issue by the answer, the motion was properly denied.

Plaintiff made a motion that the case be tried by a jury drawn from the trial jury box. This motion was denied and the trial court ordered a special venire, no jury being in attendance or drawn. It is shown by affidavit that at the time the motion was made and at the time of trial there were 250 names in the term trial jury box, properly placed therein. The better practice is to use jurors whose names are drawn from the term trial jury box. (*People v. Suesser*, 142 Cal. 354, 360, [75 Pac. 1093].) [6] It is well established, however, that the court has discretion to order a special venire, as provided in section 226 of the Code of Civil Procedure, notwithstanding the fact that there are sufficient names in the term trial jury box (*People v. Suesser*, *supra*; *Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 712, [103 Pac. 190], and cases there cited). The denial of petitioner's motion was within the discretion of the trial court.

At the time of trial the plaintiff challenged the jury panel upon the following grounds: First, that the panel

was not drawn according to law; second, that the panel was not drawn in compliance with plaintiff's demand heretofore made; that it was not summoned to attend forthwith as required by section 226 of the Code of Civil Procedure; and, third, that the sheriff was disqualified to act.

[7] The order for a special venire was erroneous for the reason that it directed the sheriff to summon twenty-four good and lawful *men* of the county, whereas by reason of the amendment of 1917 [Stats. 1917, p. 1284] to said section 226 of the Code of Civil Procedure, the venire should have required the summoning of good and lawful *persons*. This objection, however, was not specifically pointed out to the trial court and would, no doubt, have been corrected had the specific objection been made, and therefore we will not consider the objection upon appeal.

[8] The contention that the sheriff was disqualified to summon a jury was based upon the fact that Mr. Winder, one of the attorneys in the case who was charged with undue influence, was also an attorney for a corporation of which the sheriff was a director. This was insufficient to show disqualification. The right to challenge the entire panel exists in criminal cases (secs. 1055, 1064, Pen. Code), but in civil cases the right of challenge is confined to the individual juror (sec. 601, Code Civ. Proc.); moreover the basis of the challenge would have been insufficient even if such a challenge was permissible in a civil case as in a criminal case (Code Civ. Proc., sec. 602; sec. 1064, Pen. Code).

[9] Appellant complains of the form of judgment which after stating that the jury "duly rendered their verdict in favor of defendant," decrees that the executor recover his costs from plaintiff. The judgment should have formally denied the petition for the revocation of the probate of the will, but we cannot see that the appellant is injured by the failure to expressly deny her petition.

The appellant objects to the exclusion of certain evidence offered to prove undue influence. The evidence is set out in the transcript. It is unnecessary to consider in detail its admissibility, for the reason that giving to it all the probative value claimed for it by the appellant, it is insufficient, together with all other evidence produced by the ap-

pellant, to justify the submission of the issue of undue influence to the jury.

All other alleged errors claimed by the appellant are either disposed of by what has already been stated, or are too trivial to merit discussion.

Judgment affirmed.

Sloane, J., Shaw, J., Shurtleff, J., Lawlor, J., Lennon, J., and Angellotti, C. J., concurred.

Rehearing denied.

All the Justices concurred, except Shaw, J., who was absent.

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[L. A. No. 6525. In Bank.—September 15, 1921.]

THE PEOPLE OF THE STATE OF CALIFORNIA  
ex rel. CHARLES COE, Appellant, v. THE CITY OF  
LOS ANGELES, Respondent.

- [1] MUNICIPAL CORPORATIONS—CONSOLIDATION—CONDITIONS OF.—Under the law of this state relative to consolidation of municipal corporations there may be a consolidation without any assumption of existing bonded indebtedness, a consolidation with the assumption of all the existing bonded indebtedness, and a consolidation with the assumption of only a part of the existing bonded indebtedness.
- [2] ID.—ELECTION—OFFICIAL BALLOT—STATEMENT OF PROPOSITION.—The importance of stating upon the official ballot, at least in terms sufficiently specific to bring home to the voter knowledge of the general nature of the proposition upon which he is to vote, has been uniformly recognized by all our laws relative to elections under the so-called Australian ballot system.
- [3] ID.—ACT FOR CONSOLIDATING MUNICIPALITIES—CONSTRUCTION OF.—It was the design of the act "to provide for the consolidation of municipal corporations," approved June 11, 1913 (Stats. 1913, p. 577), as amended April 29, 1915 (Stats. 1915, p. 311), that a proposition to consolidate municipal corporations should be stated upon the official ballot in terms sufficiently specific to tell the voter in a general way what the whole proposition was; and where there is a failure to indicate on the ballot that there is to be an assumption by one of the municipalities of a part of the bonded

indebtedness of the other, the departure from the requisite form of ballot under the Consolidation Act is so substantial in nature that it cannot be held not to have affected the result, and there was no consolidation of the municipalities by the election.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Reversed.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and Delphin M. Delmas and F. G. Blood for Appellant.

Jess E. Stephens, City Attorney, Wm. P. Mealey, Assistant City Attorney, Lucius P. Green, Assistant City Attorney, and James G. Leovy, Deputy City Attorney, for Respondent.

ANGELLOTTI, C. J.—This proceeding is one of *quo warranto*, instituted by the attorney-general on the relation of Charles Coe. By it the people of the state assail the validity of the consolidation proceedings under which it is claimed by the city of Los Angeles that the city of Sawtelle has become consolidated with and is a part of the city of Los Angeles, and under which the latter city is exercising municipal governmental functions over the city of Sawtelle. The judgment of the trial court was in favor of the defendant, and we have before us an appeal from such judgment.

The city of Sawtelle existed up to May 4, 1917, as a separate municipality of Los Angeles County. On that day an election was held therein, pursuant to proceedings theretofore regularly had, to determine whether it should be consolidated with the larger city of Los Angeles, with the result that by a majority of three or four out of a total vote of something over a thousand, it was declared that the cities should consolidate. No question is raised as to the effectiveness of the election held in the city of Los Angeles. The principal claim of appellant is that by reason of the form of ballot used in the election in Sawtelle the question to be submitted to the electors thereof was never submitted to nor voted upon by such electors, with the result that the election therein was ineffective for any purpose. It would follow, the consent of the electors manifested by their votes

at such an election being essential to a consolidation, that no consolidation was ever effected.

At the time of the proceedings the city of Los Angeles had a large existing bonded indebtedness, for which, of course, none of the property in the city of Sawtelle was liable. It was proposed as one of the conditions of consolidation that for the payment of a very considerable part of such bonded indebtedness the property in the city of Sawtelle should, after consolidation, be subject to taxation in common with the property in the city of Los Angeles as it had theretofore existed. This condition was fully expressed in the petition originating the consolidation proceeding and in the various orders and notices in such proceeding in both cities. It is conceded by both parties, as it must be, that the question to be submitted to the electors of each city was the single and indivisible proposition that the two cities be consolidated with the assumption by the city of Sawtelle of the burden of taxation for the payment of the specified part of the existing bonded indebtedness of the city of Los Angeles, and that unless the proceedings were such as to impose that burden on Sawtelle, no consolidation was effected.

The proceedings were had under the provisions of an act "to provide for the consolidation of municipal corporations," approved June 11, 1913 (Stats. 1913, p. 577), as amended April 29, 1915 (Stats. 1915, p. 311). Section 2 of that act, having to do with such proceedings where no assumption of existing bonded indebtedness by either city is contemplated, provided, among other things, that upon the filing of the proper petition with the legislative body of the city having the smaller population, that body must call a special election "and submit to the electors of such municipal corporation the question whether such municipal corporation shall be consolidated." Notice of such election is required to be given, which notice, among other things "*shall distinctly state the proposition to be submitted*" (italics ours). It further provided that upon the ballot there shall be printed the words "Shall the cities of — and — be consolidated?" with the words "Yes" and "No" with voting squares in which the voter was to stamp a cross to indicate his vote. Various other provisions as to time and manner of notice, voting precincts, election



officers, polls, etc., are included. Section 3 had to do with the subsequent proceedings in the larger city, and it is here expressly provided that "the question" submitted to the electors thereof "shall be stated in the notice of such election *and on the ballots* to be used at such election." Section 5, as amended April 29, 1915, had to do with such consolidation where there was an existing bonded indebtedness on the part of either or both of the municipalities as to which assumption was desired. It provided that in such a case "the petition . . . may contain a request that the question to be submitted to the electors of the municipal corporation proposed to be consolidated shall be, *whether such municipal corporations shall be consolidated, as hereinbefore in this act provided, and the property in such municipal corporations shall, after such consolidation, be subject to taxation at the same rate, to pay any of such bonded indebtedness specified in said petition.*" It was then provided that if such request be made in the petition, "the question of such consolidation shall be submitted to the electors in such municipal corporation not having the greatest population, *the same in all respects as upon a petition presented under the provisions of section two*, excepting that the notice of election shall, in addition to the matters required by said section, distinctly state that it is proposed that the property in such municipal corporation shall be taxed at the same rate to pay such bonded indebtedness set forth in said petition." (Italics wherever used are ours.) The petition here did ask for the submission of this question of consolidation *and* assumption by Sawtelle of the burden of taxation with the city of Los Angeles for certain specified portions of the bonded indebtedness of the city of Los Angeles. The ordinance of Sawtelle calling the election was one "calling a special election to submit to the electors of the city of Sawtelle" the question, "Shall the cities of Sawtelle and Los Angeles be consolidated *and* the property in the said city of Sawtelle thereafter be taxed . . . to pay for certain bonded indebtedness of said city of Los Angeles." The notice of election distinctly stated the proposition "to be so submitted" as including said burdening of the property in Sawtelle with a part of the Los Angeles indebtedness, such part amounting to something over thirty million dollars. The notice, however,



provided for an official ballot entirely silent on the question of bonded indebtedness, and containing only the questions, "Shall the cities of Sawtelle and Los Angeles be consolidated?" "Yes," and "Shall the cities of Sawtelle and Los Angeles be consolidated?" "No," with a voting square to the right of and opposite each proposition, in which the voter, to whom such official ballot was delivered at the polling place, was called upon to vote by stamping a cross. The notice of election stated if he stamped a cross in the square after "Yes" his vote should be counted in favor of consolidation, and if in the square after "No" the vote should be counted against the consolidation.

The ballot used at the election was as follows:

**"INSTRUCTIONS TO VOTERS.**

"To vote on the question or proposition, stamp a cross (X) in the voting square after the word 'Yes' or after the word 'No.' All marks, except the cross (X) are forbidden. All distinguishing marks or erasures are forbidden and make the ballot void. If you wrongly stamp, tear or *deface this ballot, return it to the inspector of election and obtain another.*

Shall the cities of Sawtelle and Los Angeles consolidate?	Yes		
	No		"

The only votes for consolidation at the election in Sawtelle were such as were indicated by a cross stamped in the square at the right of the word "Yes" on such a ballot. No opportunity was given to any elector to vote in any other way or upon any proposition other than the one printed therein.

At the time of the proceedings, subdivisions 6 and 7 of section 8½ of article XI of the state constitution provided as follows:

Subdivision 6. " . . . No property in any territory hereafter consolidated with or annexed to any city or city and county shall be taxed for the payment of any indebtedness of such city or city and county outstanding at the date of such consolidation or annexation and for the payment of which the property in such territory was not, prior to such consolidation or annexation, subject to such taxation, unless there shall have been submitted to the qualified electors

of such territory the proposition regarding the assumption of indebtedness as hereinbefore set forth and the same shall have been approved by a majority of such electors voting thereon."

Subdivision 7. "In all cases of . . . consolidation of two or more incorporated cities, assumption of existing bonded indebtedness by . . . either of the cities so consolidating may be made by a majority vote of the qualified electors voting thereon in the territory or city which shall assume an existing bonded indebtedness."

It is obvious, in view of the constitutional provisions set forth, that consolidation upon the basis of subjecting property in Sawtelle to taxation for the payment of any part of the existing bonded indebtedness of Los Angeles was not effected "unless there" was "submitted to the qualified electors" of Sawtelle "the proposition regarding" such assumption, and such proposition was approved "by a majority of such electors voting thereon." This is conceded. But it is claimed, despite the fact that there was no word upon the official ballot to suggest that any question regarding assumption of indebtedness was involved, that the proposition was nevertheless "submitted to the qualified electors" of Sawtelle, and approved by a majority thereof, because of the statement of the proposition "to be . . . submitted" contained in the notice of election, and the requirement in said notice as to the form of ballot to be used at the election, which requirement, it is insisted, was in strict accord with the provisions of the act of June 11, 1913, as amended April 29, 1915, hereinbefore noted. By this notice, it is said, the electors were given full and specific notice that a vote for consolidation meant consolidation with assumption of the indebtedness specified in the notice, and the ballot used, being, it is claimed, in the form required by the act, the proposition of assumption of indebtedness was, in fact, submitted to and approved by a majority of the electors.

[1] It is to be observed that under our law relative to consolidation of municipal corporations there may be a consolidation without any assumption of existing bonded indebtedness, a consolidation with the assumption of all the existing bonded indebtedness, and a consolidation with an assumption of only a part of the existing bonded indebtedness. The proposition here "to be submitted" was the last

of these, a consolidation with an assumption by Sawtelle of a part of the existing bonded indebtedness of Los Angeles. It was placed upon the official ballot furnished the electors just as though it were the first of these, viz., a proposition for consolidation without any assumption of existing bonded indebtedness, a perfectly legal proposition under the law, but, in view of that very fact, one essentially misleading under the circumstances of this case. The ballot professed on its face to tell the voter what proposition he was to vote on, but told only half the story, omitting all reference to the very essential part relative to the assumption of any existing bonded indebtedness, the thing as to which it has been deemed proper by the people of the state to enact a constitutional provision requiring submission of the proposition to the electors and approval by them before it could be accomplished.

[2] The importance of stating upon the official ballot, at least in terms sufficiently specific to bring home to the voter knowledge of the general nature of the proposition upon which he is to vote, has been uniformly recognized by all our laws relative to elections under the so-called Australian ballot system. It is a matter of common knowledge that a great proportion of the electors have no other official knowledge of the matters to be voted on. The power of the legislature to prescribe the form of ballot may be fully conceded, but certainly it is not to be assumed that such body ever intended to provide a form of ballot that would present a proposition to the elector in such a way that it would appear to him to be an entirely different proposition from the one actually intended, even if we should assume it could legally do this. To our minds, under a fair and reasonable construction of the Consolidation Act of June 11, 1913, as amended April 29, 1915, no support can be found therein for the ballot that was used at the Sawtelle election. [3] It cannot fairly be disputed that it was the design of the act that the proposition to be submitted was to be stated upon the official ballot in terms sufficiently specific to tell the voter in a general way what the *whole* proposition was. As we have noted, section 2 had to do solely with consolidations without any assumption of existing bonded indebtedness, and it was as to *such* a consolidation that the requirement as to the statement of the question on the

ballot was made. As to *such* a consolidation, the statement there set forth was a full and complete statement of *the proposition to be voted on*, and the act, in terms, required this statement to be made on the ballot. In other words, the legislature said that *the proposition* must be stated on the official ballot. Can it be fairly doubted that such, viz., that *the proposition*, must be stated on the ballot, was the intent of the legislature in section 5 of the act, the section relative to consolidations with assumption of indebtedness. As we have seen, this section in terms states as the question to be submitted in such a case, a very different question from that submitted under section 2, one expressly including the matter of assumption of indebtedness, and the section expressly provides that "the question of such consolidation" be submitted to the electors, meaning, of course, that the question theretofore described be submitted, with the reasonable implication to our minds that *such* be the question to be, in substantial part at least, printed on the ballot. In other words, the act, fairly construed, requires the proposition to be submitted to be printed, in substantial part at least, on the official ballot. The language of section 5 of the act that except as to certain matter required to be distinctly stated in the notice of election, "the question" in such a case is to be submitted "the same in all respects as upon a petition under the provisions of section two," specially relied on by learned counsel, cannot fairly be construed, in the nature of things, as referring to the form of statement of the question on the ballot, and as authorizing a statement misrepresenting the question submitted, and not in accord with the fact. It is *the question to be submitted* that is to be submitted in all respects as on a petition presented under section 2, and the provision simply means that *such* question, not some other question, is to be submitted in all respects as the question arising under section 2 is submitted, which, to our minds, includes the statement of such question on the ballot.

The departure from the form of ballot requisite in this case under the Consolidation Act was so substantial in nature that it cannot be held not to have affected the result. It is very clear that in view of the facts it must be held that under the provisions of that act, the proposition of assumption of indebtedness was never in fact submitted

to the electors of Sawtelle or approved by them. This being our conclusion as to the proper construction of the act, it is unnecessary to consider any question as to its validity under a different construction.

From the foregoing it follows that there has been no consolidation of the city of Sawtelle with the city of Los Angeles.

The material facts we have discussed, which are undisputed, are sufficiently shown by the findings to warrant, as asked by the appellants, direction that judgment be entered in their favor.

The judgment is reversed, with directions to the court below to enter judgment upon the findings already made, in favor of plaintiffs, in accord with the prayer of their complaint.

Shaw, J., Lennon, J., Sloane, J., and Lawlor, J., concurred.

Shurtleff, J., not having heard the oral argument, did not participate.

WILBUR, J., Dissenting.—I dissent.

The statute under which the election was held expressly provides for the form of ballot. Ballots in this form were used at the election. Section 5 of the act, which regulates the procedure in the event that the assumption of a portion of the bonded indebtedness of the larger city is involved, after expressly providing for the filing of a petition praying that "the property in such municipal corporations, shall after such consolidation, be subject to taxation at the same rate, to pay any of such bonded indebtedness specified in said petition; . . ." then provides, as stated in the main opinion, that "the question of such consolidation shall be submitted to the electors in such municipal corporation not having the greatest population, the same *in all respects* as upon a petition presented under the provisions of section two, *excepting that the notice of election shall*, in addition to the matters required by said section, distinctly state that it is proposed that the property in such municipal corporations shall be taxed at the same rate to pay such bonded indebtedness set forth in said petition." (*Italics mine.*)

Thus the legislature dealt with the question of what differences are to be made in the procedure by reason of the submission to the electors of the question of the assumption of a bonded indebtedness. In the very sentence dealing with this proposition it is provided that the proceedings shall be the same in all respects as in the case where no question of bonded indebtedness is involved, with the single exception that in the former case the *notice of election shall specify the bonded* indebtedness to be assumed. If the form of ballot is changed so as to include therein a statement of the assumption of indebtedness, then the election is not conducted "*in all respects*" as it would otherwise be conducted, with the *single exception* mentioned in the statute, there are two exceptions because the exception applicable to the notice of election is read into the form of ballot and made applicable thereto, as well as to the notice of election. To express this meaning the clause of the sentence in the statute under consideration should read as follows: "... in all respects as upon a petition presented under the provisions of section two, excepting that (*ballot and*) the notice of election shall, in addition to the matters required by said section, distinctly state that it is proposed that the property in such municipal corporations shall be taxed at the same rate to pay such bonded indebtedness set forth in said petition."

It is conceded in the main opinion that the form of the ballot is a matter for legislative determination. If that is true the legislature of the state in such statute either did or did not provide the form of ballot. If it did provide the form of ballot in the case at bar, what is to be printed thereon as a statement of the proposition to be voted upon, and who is to determine the exact language thereof? The statement of the indebtedness contained in the election notice is as follows:

"That it is proposed to consolidate the city of Sawtelle with the city of Los Angeles (a city contiguous thereto and having a greater population), and that the property in the city of Sawtelle shall, after consolidation, be subject to taxation equally and at the same rate with property in the city of Los Angeles, to pay certain bonded indebtedness of said city of Los Angeles outstanding at the date of consolida-

tion, or indebtedness theretofore authorized, to be represented by bonds of said city of Los Angeles thereafter to be issued from the hereinafter set forth list:

“That the improvements for which such indebtedness of said city of Los Angeles was so incurred or authorized, the amounts of such indebtedness already incurred, outstanding at the date of the first publication of this notice, and the amounts of such indebtedness of said city theretofore authorized and to be represented by bonds hereafter to be issued, and the maximum rate of interest payable or to be payable on such indebtedness are as follows:

“ ‘Water Works Bonds’ authorized September 7, 1915, in the sum of \$1,500,000 to provide the city of Los Angeles with a water supply in the Owens River Valley, and bearing interest at the rate of 4 per cent per annum, of which there is outstanding \$1,087,500;

“ ‘Water Works Bonds’ authorized June 12, 1907, in the sum of \$23,000,000, for the purpose of acquiring and constructing waterworks for supplying the inhabitants of the city of Los Angeles with water from the Owens River Valley, bearing interest at the rate of 4 per cent per annum and  $4\frac{1}{2}$  per cent per annum, of which there is outstanding \$20,968,400;

“ ‘Electric Plant Bonds’ authorized April 19, 1910, in the sum of \$3,500,000, for the purpose of acquiring and constructing works for generating and distributing electricity for the purpose of supplying the inhabitants of the city of Los Angeles with light, heat and power, and bearing interest at the rate of  $4\frac{1}{2}$  per cent per annum;

“ ‘Harbor Improvement Bonds’ authorized April 19, 1910, in the sum of \$3,000,000 for the purpose of opening streets, constructing docks, wharves and warehouses at Los Angeles Harbor, and the constructing and maintaining of canals and waterways, and the acquisition of the necessary lands for said improvements, and bearing interest at the rate of  $4\frac{1}{2}$  per cent per annum, of which there is outstanding \$2,625,000;

“ ‘Water Works Bonds’ authorized April 15, 1913, in the sum of \$1,500,000, for the purpose of acquiring and constructing works for conducting water of the Los Angeles Aqueduct to the city of Los Angeles for domestic, irrigating and other uses, and to be known as the ‘Los Angeles City



Trunk Line,' and bearing interest at the rate of  $4\frac{1}{2}$  per cent per annum, of which there is outstanding \$1,350,000;

" 'Harbor Improvement Bonds' authorized April 15, 1913, in the sum of \$2,500,000, for the purpose of opening streets, constructing docks, wharves and warehouses at Los Angeles Harbor, and the constructing and maintaining of canals and waterways, and the acquisition of the necessary lands for said improvements, and bearing interest at the rate of  $4\frac{1}{2}$  per cent per annum, of which there is outstanding \$2,305,000;

" 'Electric Plant Bonds' authorized May 8, 1914, in the sum of \$6,500,000, for the purpose of acquiring and constructing works for generating and distributing electricity for the inhabitants of the city of Los Angeles with heat, light and power, bearing interest at the rate of  $4\frac{1}{2}$  per cent per annum."

Is this whole statement of the nature and character of the indebtedness to go on the ballot? Must the ballot show not only the actual bonds sold but the amount of bonds which the city is already authorized to sell by reason of the voting of the bond issue? If this whole statement is not to be incorporated on the ballot, who is to determine what portion is to be inserted and what is to be omitted? It would seem clear that if the legislature had contemplated that any statement in regard to the indebtedness should be actually printed on the ballot, they would have indicated some short method of stating the proposition.

The scrupulous care with which the legislature considered the effect upon the proceedings of the assumption of bonded indebtedness is shown by the special provision contained therein with reference to the particular case where the annexed territory is to assume its proportion of *all* of the bonded indebtedness of the city. In such case it is provided that it is sufficient in the petition and in all other proceedings to describe the same as the bonded indebtedness of (Los Angeles, for instance). The particular language is as follows: "provided, however, that if such petition contains a request that the property in such municipal corporations be, after such consolidation, subject to taxation to pay all of the bonded indebtedness incurred or authorized of such municipal corporations, such bonded indebtedness and improvements for which such bonded indebtedness was in-



curred or authorized may be described in such petition and in all other proceedings hereunder as 'the bonded indebtedness of —— (insert the names of the municipal corporations),' without specifying the improvements.'"

If the legislature has not covered the form of ballot for the particular case where the question of consolidation and assumption of indebtedness are both submitted as a single proposition to the voters, the question is whether the officials conducting the election are charged with the obligation of determining the exact language to be printed upon the ballot. It would seem clear that the authority should be exercised by the legislative body or bodies intrusted with the conduct of the election rather than by the clerk who prepares the form of ballot for the printer.

The board of trustees of the city of Sawtelle by Ordinance No. 186 made provision for the conduct of the election in question and caused a notice of election to be published in accordance therewith, in which it was said: "That upon the ballots to be used at said special election, in addition to the other matter required by law, there shall be printed the following: 'Shall the cities of Sawtelle and Los Angeles be consolidated?' 'Yes,' and 'Shall the cities of Sawtelle and Los Angeles be consolidated?' 'No,' and there shall be a voting square to the right of and opposite each proposition, and on separate lines." Then follow directions for the marking of the ballot. This form of ballot was that by which the trustees of Sawtelle submitted to the electors thereof the single question whether the two cities should be consolidated and the territory formerly under the jurisdiction of the city of Sawtelle be subjected to taxation for the portion of the indebtedness of the city of Los Angeles specified in the notice of election.

In so far as this form of ballot fails to show on its face the results with reference to the indebtedness which are to be brought about by the affirmative vote, it is suggested that the ballot is deceptive. Surely the voters must have known that consolidation would have some effect upon the indebtedness of both cities involved. "As a rule, existing debts of the corporation contracted before the limits were extended, unless otherwise provided by law, are chargeable upon the added territory as well as that comprehended by the boundaries before they were altered or extended."

(McQuillin on Municipal Corporations, sec. 294.) In the absence of any notice to the contrary, therefore, the voters voting at the election would assume that the effect of consolidation would be to charge them proportionately with the entire indebtedness of the city of Los Angeles. It is true, as pointed out in the main opinion, that the particular statute under consideration does permit a consolidation of city governments whereby neither city would assume any of the indebtedness of the other. It is fundamental in the administration of the law that everyone is presumed to know the law. The voter, therefore, is presumed to know that he is to ascertain the effect of his ballot in this particular instance by consulting the notice of election and the petition originating the proceedings. No voter is entitled to have printed upon the ballot all of the information which may be necessary for him to exercise an intelligent choice. All he is entitled to in this regard is that his ballot may be deposited by him in such fashion as to clearly indicate his decision upon the question submitted to the voters. And this is usually done by merely stamping a cross in one or another of two places upon the ballot. If there is any difficulty in this case it arises not from any uncertainty in the form of ballot or as to the issues submitted to the voters, but from a failure to incorporate in the ballot information which would assist the voter in determining how he should cast his vote.

I fully agree with the majority of the court that it would have been desirable to have indicated in some form upon the ballot the fact that the effect of the vote was to charge the property within the former territory of Sawtelle with a portion of the indebtedness of the city of Los Angeles, thus calling the attention of the careless voter to the significance of his vote, but the determination of the form of the ballot is one for the legislature, and I think that the form of the ballot is so clearly indicated in the statute in question that no executive officer charged with the preparation of ballots could think of departing from the plain terms of the statute nor would well advise city councils to do so. They would do what was done in this case to clarify the exact proposition submitted to the voters by a declaration thereof in the ordinance calling the election and in the notice of election; and by expressly providing for the form of the ballot which

would be used in the determination of the question submitted, such form to accord with the statutory provision.

There was no chance for the voters of Sawtelle to be defrauded or misled in this matter. If they were not informed as to the terms of the statute and if they were unfamiliar with the express statute, and merely relied upon general principles in voting, they knew that the property in the city of Sawtelle would have been charged with a larger indebtedness than that actually assumed by the vote for consolidation.

In view of the opinion of the majority of the court, the constitutional question raised in the petition for rehearing in this court becomes unimportant to a decision. If, however, the statute is construed as I contend it should be, the constitutional question is involved, and as a conclusion in favor of the appellant would require a concurrence on my part in the main opinion, I briefly state my views in relation thereto. Section 8½, article XI, of the constitution, as amended in 1918, quoted in the main opinion, provides that no property in any territory hereinafter consolidated with or annexed to a city shall be taxed for the payment of any outstanding indebtedness of the city unless the proposition of incurring the assumption of indebtedness is approved by a majority of the electors voting thereon. If this section requires that the fact of indebtedness and of its proposed assumption be printed upon the ballot, then the statute under consideration as construed by me would be unconstitutional, for it provides for the consolidation of cities and an assumption of indebtedness without such a statement on the ballot. But in order to submit a question to the voters it is not necessary that it should be printed upon the ballot; for instance, constitutional amendments are submitted to the people without printing more than a mere indication of the tenor thereof upon the ballot. The section of the constitution under consideration (article XI, section 8½) expressly provides: "The legislature shall enact such general laws as may be necessary to carry out the provisions of this section and such general or special laws as may be necessary to carry out the provisions of subdivisions 5 and 6 of this section, . . ." In the constitutional provision providing for the initiative and referendum (art. IV, sec. 1), the Secretary of State is required to

submit to the electors for their approval or rejection the initiative or referendum matters, but the form of the ballot by which they are to be submitted is not provided therein. It is further provided: "This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved." The form of ballot is in the control of the legislature. (*Haskell v. City of Long Beach*, 153 Cal. 543, [96 Pac. 92].) I therefore conclude that the city authorities, having pursued the method indicated by the legislature for ascertaining the will of the voters and the voters having expressed their will in the form provided by law, that the annexation of Sawtelle to Los Angeles has been effected and that the territory within the former boundaries of Sawtelle is liable to be assessed with other property within the city of Los Angeles for that portion of the indebtedness set out in the notice of election.

Rehearing denied.

All the Justices concurred, except Shaw, J., and Wilbur, J., who were absent.

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[L. A. No. 5848. In Bank.—September 15, 1921.]

ANNA KINLEY, Appellant, v. W. T. LARGENT, Administrator, etc., Respondent.

[1] EVIDENCE—DISQUALIFICATION OF WITNESSES—SECTION 1880, SUBDIVISION 3, CODE OF CIVIL PROCEDURE—WAIVER—EXECUTORS AND ADMINISTRATORS.—The provision of section 1880, subdivision 3, of the Code of Civil Procedure, that parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person, cannot be witnesses, may be waived by the personal representative of the decedent; and in an action by the surviving widow

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1. Right of personal representative, heir or next of kin of party to waive privileged communication, notes, 10 Ann. Cas. 1118; Ann. Cas. 1913A, 100.

of the deceased to recover from his estate a certain amount which she had turned over to him for investment in bonds, where the administrator expressly declined to object to the widow testifying on the grounds of incompetency under said section, the waiver should have been allowed and the witness permitted to testify.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Reversed.

The facts are stated in the opinion of the court.

James M. O'Brien for Appellant.

James B. Barry for Respondent.

LAWLOR, J.—This is an appeal by the plaintiff, Mrs. Anna Kinley, from a judgment which she recovered from the administrator of the estate of James Kinley, deceased. The decedent and appellant were husband and wife.

The action was brought to recover the sum of \$3,444, which appellant had turned over to decedent for investment in street bonds. Up to the time of his death he had made no report on the investment. Appellant presented a demand to the administrator for the said sum, which was disallowed upon the ground that under subdivision 3, section 1880 of the Code of Civil Procedure, appellant was incompetent to testify against the estate and that respondent was unwilling to assume the responsibility of waiving the incompetency. This action followed.

Upon the trial, appellant offered herself as a witness, whereupon the following statements by the court and the respective counsel were made: "The Court: Is this such a claim against an estate as bars the claimant from being a witness under section 1880 of the Code of Civil Procedure? Mr. O'Brien: I presume that the claimant would be disqualified as a witness under that section if an objection were made to her testimony. This matter, however, has already been discussed with the administrator and his attorney, and in view of the fact that both the administrator and his attorney are convinced that an injustice would result if such an objection were made, they have decided not to make any objection to the competency of the plaintiff as a witness in her own behalf in support of her claim against the estate. Mr. Barry: I want to say, your Honor,

that Mr. Largent, the administrator of decedent, was a next-door neighbor of the plaintiff and her husband for a long time prior to the latter's death. He became intimately acquainted with them and knew, prior to the death of Kinley, that moneys had been so advanced to him by his wife, as now claimed by her. Under those conditions we feel that to interpose a technical objection to the competency of the plaintiff to testify as a witness in her own behalf in this suit would result in an injustice. As we have no desire to be the cause of an injustice, we do not feel it right or proper to make such objection. The Court: I am inclined to the opinion that the statute cannot be waived by a failure of the administrator, or his attorney, to make the objection. I will hear your evidence and make a ruling on this point later."

Appellant identified five drafts, aggregating \$2,467.10, which were admitted in evidence, and testified to other advances aggregating \$979.50, but as this latter amount depended on her testimony alone, the evidence was excluded, the court saying: "I will allow the plaintiff the aggregate amount of the several drafts which she has identified. I cannot consider her testimony as to the other advancements. The rule is a harsh one and even works injustice, but it is absolutely necessary to protect an estate from injustice. I have no doubt in my mind that Mrs. Kinley's claim is a just one. No objection is necessary. The statute is provided for just that purpose."

Appellant's position is thus stated: "There is only one point involved on this appeal. If the incompetency prescribed by section 1880 of the Code of Civil Procedure cannot be waived, the judgment of the lower court must be affirmed. If it can be waived, it was waived in this case, and the lower court should be directed to enter judgment for the entire amount and interest claimed by the plaintiff. The principle which we urge to be the law may be stated thus: The statutory incompetency of parties or assignors of a party to an action or proceeding, or persons in whose behalf the same is prosecuted, against an executor or administrator upon a demand against the estate of a deceased person to testify as to any fact occurring before the decedent's death is not absolute, but may be waived, and if waived, the testimony of such person must be considered."

Section 1880 of the Code of Civil Procedure reads, in part, as follows:

“The following persons cannot be witnesses: . . . 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person.” There is no authority in this jurisdiction directly on the question whether the personal representative of a deceased person may waive the incompetency contemplated in this provision. In other jurisdictions it has been held that the incompetency of a claimant to testify under their respective statutes may be waived, and in Jones on Evidence, volume 4, section 780, it is said, referring to the incompetency of a claimant to testify against an estate of a deceased or incompetent person: “This exception to the statutory rule removing the incompetency of parties was introduced for the benefit of those representing the deceased or incompetent person; and their representatives may, if they choose, waive this privilege. All objection to the competency of a witness as to a transaction with an incompetent or deceased person will be deemed waived, if it is not made at the time that the evidence is given. . . . An administrator and his counsel cannot sit by without objecting to the admission of incompetent evidence, and expect the trial judge to rule it out on his own motion. The objection must be to the competency of the witness, not merely to the competency or relevancy of the evidence.” Numerous authorities are cited in support of the text. In general, the statutes of other jurisdictions only disqualify the claimant to testify *against* the estate. (See compilation of statutes in Wigmore on Evidence, sec. 488.) Section 1880, on the other hand, provides that a claimant *cannot be a witness* as to any matter or fact occurring before the death of the deceased person. However, in construing this section it has been held, notwithstanding its broad language, not to mean that the claimant cannot become a witness *under any circumstances*. Thus, in *Chase v. Evoy*, 51 Cal. 618, a new trial was ordered because one of the defendants was not allowed to testify on behalf of the estate. The court declared: “The language of the statute is very broad, and if literally construed, might exclude all parties to the action,



whether called to testify for or against the estate. But to give it this construction would defeat the manifest purpose of the act, and we think the language is capable of a different interpretation. Parties to the action, or in whose behalf it is prosecuted, are not allowed to testify against the estate in a suit to establish a demand against it. One of the parties to the transaction out of which the demand originated being no longer *in esse*, it was deemed unwise to permit the other party to it to testify to his version of it, when called by the plaintiff in a proceeding against the estate to establish the demand. The statute, it is true, provides in general terms that 'the parties to an action or proceeding' against the estate shall not testify; but the obvious meaning of this provision is that a party to the action shall not testify against the executor or administrator. . . . But in view of the evil to be remedied, the legislature could hardly have intended to prohibit the executor or administrator from calling a party to the action to testify in behalf of the estate. On the opposite theory, the defendant, representing the estate, would not be permitted to call the plaintiff himself to prove that the demand was fraudulent or had been fully paid. Such a construction of the statute is wholly inadmissible, and would be at variance with its manifest intent." In *Roche v. Ware*, 71 Cal. 375, [60 Am. Rep. 539, 12 Pac. 284], the claimant was made a witness for the purpose of identifying certain books connected with his claim against the estate. *Colburn v. Parrett*, 27 Cal. App. 541, [150 Pac. 786], was a similar case.

It is proper to point out that in some of the cases arising under this subdivision language is used which might indicate that the incompetency was absolute. Thus, in *Rose v. Southern Trust Co.*, 178 Cal. 580, [174 Pac. 28], it was remarked that "Such a witness *must not* testify." However, in that case, the opinion shows that the testimony was objected to on the trial of the action, so the question of a waiver was not presented. Moreover, as already shown, there are cases in this jurisdiction where, even against objection, the party was allowed to become a witness for some purposes.

It is clear that subdivision 3 is to be given no broader effect than if it merely provided that a claimant is incompetent to testify *against* the estate. This interpretation gives to the statute the same meaning as that expressed



in those statutes of other jurisdictions wherein it is held, as has been seen, that the personal representatives of the deceased may waive the incompetency. Allowing this waiver will not operate to defeat the object of the statute, for it is always in the power of the administrator or executor by timely objection to bar the witness. [1] It follows that under subdivision 3 of section 1880 the personal representative should be permitted to waive the incompetency. Hence, as the administrator herein expressly declined to object to the witness on the ground of incompetency, the waiver should have been allowed and the witness permitted to testify.

It should be noted that "a judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, *only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge, . . .*" (Code Civ. Proc., sec. 1504), and that "all matters, *including allowed claims* not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs, for cause shown," on the settlement of an account (Code Civ. Proc., sec. 1636). It thus appears that the judgment in an action such as this against the executor or administrator is not conclusive against the heirs.

Judgment reversed.

Shaw, J., Sloane, J., Shurtleff, J., Lennon, J., Wilbur, J., and Angellotti, C. J., concurred.

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[L. A. No. 5704. In Bank.—September 16, 1921.]

FRANK C. TURNER, Respondent, v. FIDELITY AND DEPOSIT COMPANY OF MARYLAND, (a Corporation), Appellant.

[1] BONDS—RELEASE OF ATTACHMENT—CONSTRUCTION OF.—The effect of a bond providing that a surety company in consideration of the release from attachment of certain property undertakes in a certain sum and promises that in case the plaintiff recovers judgment in the action the defendant will, on demand, pay to plaintiff the

amount of whatever judgment may be recovered in the action, together with interest and costs, is that the surety company guarantees the payment by the defendant on demand of any judgment recovered in said action, and, on default in such payment, to indemnify the plaintiff to the amount of the judgment, not to exceed the sum named.

- [2] **ID.—GUARANTORS AND SURETIES—ALTERATION OF CONTRACT—RELEASE.**—It is the settled law of this state that a guarantor or surety may stand upon the strict terms of his contract, and that any unauthorized alteration of the obligation assumed, whether detrimental to the guarantor or not, releases him from liability.
- [3] **ID.—ACTION ON BOND—AMENDMENT OF PLEADINGS.**—In an action upon such a bond, unless amendments to the complaint are such as to substitute new or different parties, or to state a new and independent cause of action, the sureties or guarantors are bound by the judgment.
- [4] **ID.—OBLIGATION—AMENDMENT OF PLEADINGS.**—In an action upon a bond given to release an attachment, where the contract of the surety company is that the defendant will pay to plaintiff the "amount of whatever judgment may be recovered in said action," the obligation which it is sought to enforce against the principal through the suit and judgment is the payment of the liability arising under the contract set out in the complaint, and the plaintiff is not estopped by his original complaint from making any corrections or supplying any omissions by amendment which are proper or necessary to fully set forth the liability of the defendant under the contract sued upon.
- [5] **ID.—SURETYSHIP—DEATH OF PRINCIPAL—LIABILITY OF SURETY.**—A bond given to release an attachment is not exonerated, nor the right of recovery suspended, by the death of the principal and the prosecution of the action to judgment against the administrators of his estate.
- [6] **ID.—JUDGMENT AGAINST ADMINISTRATORS—PAYMENT OUT OF ESTATE.**—As against the administrators and the property of the estate of a deceased person, a judgment recovered is only payable from the assets of the estate in due course of administration, and such judgment is only the equivalent of an allowed and approved claim.
- [7] **ID.—JUDGMENT AGAINST ESTATE—EFFECT ON SURETIES.**—In an action upon a bond given to release an attachment the judgment against the administrators of the estate of a deceased principal fixes the liability of the surety so far as the conclusiveness of the judgment on the original claim is concerned, and the plaintiff is

under obligation to look no further than to his surety in enforcing collection.

- [8] **ID.—RIGHTS OF SURETY—CONSTRUCTION OF BOND.**—While the rule is that a surety may rely upon the strict terms of his contract, there is no reason in law or equity why the same liberality of construction and interpretation of those terms should not be applied as in construing any other contract.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Russ Avery, Judge. Affirmed.

The facts are stated in the opinion of the court.

Redman & Alexander, S. E. Vermilyea and S. L. Carpenter for Appellant.

Stephens & Stephens for Respondent.

Short, Lindsay & Woolley, *Amici Curiae*, for Respondent.

**SLOANE, J.**—This is an appeal from a judgment holding the defendant corporation liable upon a common-law bond given on release of an attachment in an action between the plaintiff and one John Howse.

This bond recited that an action was pending wherein it was claimed that there was due and owing from the defendant Howse to the plaintiff the sum of \$23,401.76, and that an attachment had been issued against the property of defendant, and that the defendant was desirous of releasing said property from the attachment. It then provides that "The undersigned, Fidelity and Deposit Company of Maryland, . . . in consideration of the premises, and also in consideration of the release from said attachment of the property attached, as above mentioned, does hereby undertake in the sum of \$24,000, and promises, that in case the plaintiff recovers judgment in the action, the defendant will, on demand, pay to the plaintiff the amount of whatever judgment may be recovered in said action, together with interest and costs."

[1] The effect of this bond is that the Security Company guarantees the payment by the defendant on demand of any judgment recovered in said action, and, on default in such payment, to indemnify the plaintiff to the amount of the judgment, not to exceed the sum of \$24,000.

Pending the final determination of this suit, the defendant died and the action was carried on against his administrators, and judgment was obtained against them for the sum of \$30,813.51 and costs, to be paid from the assets of deceased defendant's estate in the due course of administration.

After this judgment became final plaintiff demanded the payment thereof from the administrators of decedent's estate, and payment being refused, this suit was brought against the Surety Company upon the bond given for release of attachment, and the judgment was obtained which is the basis of this appeal. The judgment against the Surety Company is for \$24,000, the full penal sum of the bond, together with interest thereon and costs.

The principal contention of the appellant Surety Company is that it was exonerated from the penalty of its undertaking by reason of amendments to the complaint in the original action, made after the bond was executed, whereby the liability of the surety was changed.

The action as set forth in the original complaint against the defendant Howse alleged a contract between the plaintiff and said Howse relating to the subdivision and sale of a tract of land, whereby the latter had become liable to plaintiff for \$14,800, for failure to pay a note and mortgage upon plaintiff's land; for \$5,000 damages for failure to pave a certain street, and \$3,601.76 on the release and transfer of certain lots.

This was the statement of the cause of action at the time the bond on release of attachment was made. Subsequently, plaintiff filed an amended complaint in which he alleged his claims under the same general contract, upon the note and mortgage for the same amount as in the original complaint, but set out in the second count in place of the allegation of failure of defendant to "grade or pave one street" to his damage in the sum of \$5,000, that the defendant "wholly failed" to put in the street work, sidewalks, and curbs as required by the contract, to the damage of plaintiff in the sum of \$7,500; and as a third count, instead of seventeen lots released at \$390.62 each, in the sum of \$3,601.67 and interest, as pleaded in the original complaint, he alleged twenty-three lots released at \$390.62 each, in the entire sum of \$5,945.48. The amended complaint also

contained an item of \$458.11 for failure of defendant to pay certain taxes covered by the contract, but this was not allowed in the judgment.

Without going into further details as to the amendment of the pleadings, it is sufficient to say that both the original and amended complaints were upon the same general contract and stated the same cause of action. The amendments did, however, serve to state a greater liability against the defendant than could have been recovered under the original complaint; and, whereas, the amount demanded under the original complaint, as recited in the bond for release of attachment, was \$23,401.76, the amounts claimed under the amended complaint aggregated \$27,903.59, besides interest and costs, and the judgment recovered amounted to \$30,813.51.

It appears from the recitals of the judgment that the above total was made up of \$17,296.94 on the first count, \$4,988.15 on the second, and \$8,528.42 on the third count.

[2] It is the settled law of this state that a guarantor or surety may stand upon the strict terms of his contract, and that any unauthorized alteration of the obligation assumed, whether detrimental to the guarantor or not, releases him from liability. (*Driscoll v. Winters*, 122 Cal. 65, [54 Pac. 387]; *Tuohy v. Woods*, 122 Cal. 665, [55 Pac. 683]; *First Congregational Church v. Lowrey*, 175 Cal. 124, [165 Pac. 440]; *Michelin Tire Co. v. Bentel*, 184 Cal. 315, [193 Pac. 770].) This rule is succinctly stated in our codes. Section 2819 of the Civil Code, relating to the exoneration of guarantors, provides that "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

The latest expression of this court on the subject recognized this application of the rule to undertakings on release of attachments, as affected by subsequent amendments of the complaint by releasing the sureties. (*Michelin Tire Co. v. Bentel*, *supra*.) In that case the undertaking of the bond was to "pay the amount of the judgment recovered in the action" in case of default by the defendant in making

such payment. In the Michelin case, however, an entirely new cause of action was set out in the amended complaint. The plaintiff had instituted suit upon a claim which at the time belonged to another related corporation, and, therefore, the plaintiff named had no cause of action at the time the undertaking on release of attachment was given. By stipulation between the plaintiff and defendants an amended complaint was filed, setting up an assignment of the claim to the plaintiff corporation, made subsequently to the release of attachment. This was equivalent to the commencement of a new action, and the judgment obtained was not in the action in which the undertaking was given. That decision is, therefore, easily distinguishable from the one before us on its facts, as here there was no change in the cause of action, and the judgment sued on was the judgment recovered in the action which was pending when the bond was given.

It is argued, however, that the reasoning of the opinion applies in this case. It is there said, quoting from *Cassidy v. Saline County Bank*, 7 Ind. Ter. 567, [104 S. W. 838]: "The surety upon a bond given by the defendant to dissolve an attachment takes his obligation with reference to the cause as it then stands; and should the plaintiff afterward so change his pleadings as to make virtually a new action, how can it be said that the surety would have obligated himself under the new order of things? He may have been satisfied that the plaintiff could not recover in the action and may therefore have been willing to give the defendant present relief by signing as his bondsman, though he would not have signed had the suit been well grounded."

The amendment above referred to consisted in changing the cause of action from one on open contract to one on a judgment obtained in another state upon the same contract. The force of the decision in its application to the matter before us is, however, lost by the circumstance that the appellate court there held that the amended complaint stated a new cause of action.

The opinion in *Michelin Tire Co. v. Bentel*, *supra*, further quoting from *Quillen v. Arnold*, 12 Nev. 244, recognizes the doctrine that while the power to allow amendments

“may be and is very liberally exercised, and very properly so, as between the parties to the action in furtherance of justice, it cannot be exercised with the effect of changing the rights and liabilities of third parties.”

In all but one of the cases cited in the Michelin Tire Company case in support of the opinion, there was by the amendments complained of either a change of the cause of action, or a change of parties to the action. In *Price v. Clark*, 127 Mass. 599, there is some support to appellant's contention for exoneration, on the face of the opinion. The action in that case as originally brought was for a balance on account after allowing certain credits. The complaint was amended by omitting the credits and suing on the entire claim. This was held such a variance as to release the securities. There are other decisions cited by appellant open to the same construction.

[3] The weight of authority, however, seems to sustain the rule that unless the amendments are such as to substitute new or different parties, or to state a new and independent cause of action, the sureties or guarantors are bound by the judgment.

It is generally held that where a surety whose obligation discharges from attachment the assets of the debtor upon which the attaching creditor had a right to rely for security of his claim, such surety ought not to be exempted from liability unless the obligation with reference to which he contracted has been essentially changed without his consent. Having made himself responsible for “any judgment recovered in the action,” it would be unduly limiting his agreement to permit him to plead successfully an amendment that did not alter the “nature and character” of the original claim. (*Warren Bros. v. Kendrick*, 113 Md. 603, [140 Am. St. Rep. 445, 77 Atl. 847]; *Russia Cement Co. v. Le Page*, 174 Mass. 349, [55 N. E. 70]; *Jaynes Exrs. v. Platt*, 47 Ohio St. 262, [21 Am. St. Rep. 810, 24 N. E. 216]; *Driscoll v. Holt*, 170 Mass. 262, [49 N. E. 309]; *Doran v. Cohen*, 147 Mass. 342, [17 N. E. 647]; *Morton v. Shaw*, 190 Mass. 554, [77 N. E. 633]; *Hammond v. Starr*, 79 Cal. 556, [21 Pac. 971].)

[4] The confusion that has arisen in this case, and in some of the authorities cited, has resulted from a failure to distinguish between the complaint and the cause of action



attempted to be stated in the complaint. The complaint filed in a suit is not the obligation, nor the basis of the obligation of the principal which the surety guarantees. The contract of the Surety Company in this action was that it would undertake that the defendant would pay to plaintiff the "amount of whatever judgment may be recovered in said action." The obligation which it was sought to enforce against the principal through the suit and judgment demanded was the payment of the liability arising under the contracts set out in the original complaint. There was no alteration or modification of that contractual liability of the defendant. The plaintiff was not estopped by his original complaint from making any corrections or supplying any omissions by amendment which were proper or necessary to fully set forth the liability of the defendant under the contract sued on. The surety entered upon its contract to guarantee payment of the judgment, any judgment on the cause of action, with presumptive understanding that the original complaint might be amended to cover any damages which had occurred prior to commencement of suit from a breach of the contracts which constituted the cause of action, though omitted from the original complaint. (*Bierce v. Waterhouse*, 219 U. S. 320, [55 L. Ed. 237, 31 Sup. Ct. Rep. 241, see, also, Rose's U. S. Notes].)

If the liability of the release bond had been predicated upon a judgment on the precise facts pleaded in the original cause of action, then such complaint would be the measure of the liability, but the surety contracted upon the basis of whatever judgment was obtained in the action, and it will be presumed to have taken into consideration the possibility of changes by amendment in the extent and nature of the liability incident to the cause of action.

Indeed, the Surety Company here did safeguard itself from any material increase in its liability through amendments to the complaint by fixing the penalty of its bond at a sum only sufficiently greater than demanded by the prayer of the original complaint to cover prospective interest and costs.

[5] Appellant makes the further point on this appeal that the bond is exonerated, or at least the right of recovery suspended, by the death of the defendant and the prosecu-



tion of the action to judgment against the administrators of his estate.

It is true that the death of the defendant is held to operate to dissolve an attachment (*Myers v. Mott*, 29 Cal. 359, [89 Am. Dec. 49]; *Ham v. Cunningham*, 50 Cal. 365). The right to pursue the debtor's property under attachment ends with his death, the attached property falls into the estate, and the only right left the attaching creditor as against the decedent's estate is to follow it under the modes of disposition provided by the probate law. But here the remedy of the plaintiff is not concerned with the estate of the deceased debtor. He has an independent remedy created by his contract with the surety company.

That fact is also an answer to the objection that there is no judgment that is enforceable except in the due course of administration.

[6] As against the administrators and the property of the estate the judgment recovered is only payable from the assets of the estate in due course of administration. It is the law of California as affecting the administration of estates, that such judgment is only the equivalent of an allowed and approved claim. (Code Civ. Proc., sec. 1504; *Hall v. Cayot*, 141 Cal. 13, [74 Pac. 299]; *Estate of Heller*, 169 Cal. 77, [145 Pac. 1008]; *Haub v. Leggett*, 160 Cal. 491, [117 Pac. 556].)

[7] There appears to be no reason, however, for putting this limitation upon the effect of such judgment in fixing the liability of a guarantor under an original and independent contract to respond in the penal sum of its undertaking upon failure of payment on demand of any judgment in the action. The judgment against the administrators is still a judgment, qualified only by the limitation that it may be contested by the heirs upon the settlement of the account of the administrator. (Code Civ. Proc., sec. 1637; *Haub v. Leggett*, *supra*.) The judgment in this action fixes the liability of the surety so far as the conclusiveness of the judgment on the original claim is concerned, and the plaintiff is under obligation to look no further than to his surety in enforcing collection. Moreover, it is pleaded in the complaint, and found by the court, that the appellant's liability on this bond has been presented and allowed as a contingent claim against the estate, and confirmed by a decree

settling the account of the administrators in which this claim is returned as one of the liabilities of the estate. (Code Civ. Proc., sec. 1637.)

As to the survival of the right of action upon the bond for release after the death of the debtor in attachment proceedings, it is held by the supreme court of Illinois in a similar case, *Sharpe v. Morgan*, 144 Ill. 382, [33 N. E. 22], that after attachment released on giving of bond the action proceeds *in personam* (*Hill v. Harding*, 93 Ill. 77), and in event of the death of original defendant and further prosecution of the suit to judgment against his administrators, the judgment obtained is a personal judgment and neglect by administrators to pay the same is a breach of the bond. In its opinion in the above case the court says: "Appellant [the surety] voluntarily joined with the attachment debtor, and took upon himself the obligation prescribed by the statute, to pay whatever judgment might be rendered in the action. He was bound to know that upon the death of Allison [the defendant] the suit would not abate but might proceed to final judgment against his personal representative."

The undertaking in the cited case was a statutory bond, and the parties were bound by the intendments of the statute in interpreting its obligations. But the conclusion can be no different here under the implied understanding of the parties arising from the fact that they were contracting with presumptive knowledge of the law; and the surety here is presumed to have known and have in mind the fact that this suit would not abate in the event of the death of defendant but could be prosecuted against his administrators. (Code Civ. Proc., sec. 385.)

[8] In this case the Surety Company stands upon a purely technical defense, and while it is true that the rule is in its favor that it may rely upon the strict terms of its contract, there is no reason in law or equity why the same liberality of construction and interpretation of those terms should not be applied as in construing any other contract.

In the matter of the obligations of corporations organized to execute surety bonds and securities as a business there is a growing disposition in the courts to hold such sureties to their obligations unless there has been some material

departure from the conditions of the agreement. (21 R. C. L., p. 1160; Ann. Cas. 1912B, 1087.)

The judgment is affirmed.

Shaw, J., Shurtleff, J., Lennon, J., Wilbur, J., Lawlor, J., and Angellotti, C. J., concurred.

Rehearing denied.

All the Justices concurred, except Shaw, J., who was absent.

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[Sac. No. 3266. In Bank.—September 16, 1921.]

F. G. ATHEARN, Petitioner, v. G. W. NICOL et al.,  
Judges of the Superior Court, Respondents.

- [1] SUPERIOR COURT—INCREASE IN NUMBER OF JUDGES OF COUNTY—POWER OF GOVERNOR.—The Governor of the state is authorized to temporarily increase the number of superior court judges in a county by a request that judges from other counties sit within that county as superior court judges.
- [2] DRAINAGE DISTRICT—DETERMINING VALIDITY OF ASSESSMENTS—JURISDICTION OF COURT.—Assuming that the matter pending before a superior court of hearing and determining a question as to the validity and proper apportionment of assessments of a drainage district is a judicial one, as the statute expressly declares, the court has jurisdiction of the matter, and three superior court judges selected by the Governor to sit in that court in the matter have jurisdiction to dispose of the same.
- [3] ID.—DISQUALIFICATION OF JUDGE.—The judge of the superior court of a county is disqualified, under subdivision 5 of section 170 of the Code of Civil Procedure, from hearing proceedings to determine the validity and proper apportionment of assessments of a drainage district when they affect or relate to any real property within his county.
- [4] SUPERIOR COURT—EXTRA JUDGES.—There may be as many sessions of the court as there are superior court judges in a county, including those assigned thereto by the Governor and those acting *pro tempore*, and all of these judges can also sit together at one time for the trial of a case; and the constitution contemplates a session held by one or more judges as well as by one and by all.

- [5] **ID.—JUDGES SITTING TOGETHER.**—The constitution authorizes three judges of the superior court, if they choose, to sit together for the purpose of hearing any proceeding over which the court itself has jurisdiction.
- [6] **ID.—DETERMINATION BY MAJORITY.**—The general rule is that where authority is conferred upon a court of more than one judge, the majority can render decisions of the court in the absence of express statutory or constitutional provision to the contrary.
- [7] **ID.—JURISDICTION—SUFFICIENCY OF COMPLAINT.**—If a court sitting to determine the validity and apportionment of assessments of a drainage district has jurisdiction and authority to pass upon the validity of the assessments and the questions arising with relation thereto, the sufficiency of the complaint or document filed to invoke that jurisdiction is one to be determined by it upon the hearing and does not affect its jurisdiction to pass thereon.
- [8] **DRAINAGE DISTRICT—DETERMINATION OF VALIDITY OF ASSESSMENTS—JUDICIAL PROCEEDINGS.**—The legislature, under the act relating to the issuance of bonds for assessments for improvements in the Sacramento and San Joaquin drainage district (Stats. 1919, p. 1092, secs. 4, 5), contemplated a court proceeding, and provided that such proceeding should be commenced in the superior court, and upon a judgment by it affirming the validity of the bonds no further attack is permitted thereon.

APPLICATION for Writ of Prohibition. Writ denied.

The facts are stated in the opinion of the court.

Haven, Athearn, Chandler & Farmer, for Petitioner.

Elston, Clark & Nichols, *Amici Curiae*, for Petitioner.

Frank Freeman for Respondents.

Devlin & Devlin, *Amici Curiae*, for Respondents.

Thomas Rutledge, Brown & Alberry and Mastick & Partridge for West Side Land Owners.

WILBUR, J.—The petitioner asks for a writ of prohibition directed to the respondents, who are judges of the superior court, requiring them to desist from the contemplated trial of certain proceedings instituted under and by virtue of an act of the legislature (Stats. 1919, p. 1092, secs. 4, 5) relating to the issuance of bonds for assessments

for improvements in the Sacramento and San Joaquin drainage district. The respondents have been designated by the Governor to sit as judges of the superior court in and for the county of Sutter to hear and determine the questions that may be raised before them concerning the validity and proper apportionment of assessments of said district aggregating over eight million dollars. The procedure followed in this case is in accordance with an act of the legislature of the state of California (Stats. 1919, p. 1092, secs. 4 and 5), supplementing other legislation (Stats. 1911, Ex. Sess., p. 117; Stats. 1913, p. 252; Stats. 1915, p. 1338; Stats. 1919, pp. 1091, 1122, 1209) concerning the organization and powers of said district. By such legislation authority is given for the construction and maintenance of improvements in said district and the levying of assessments upon the property within the district.

The statute under consideration provides that after the levy of the assessment by the assessor and the approval thereof by the reclamation board a proceeding shall be instituted by the reclamation board in the "Superior Court of the State of California in and for the county" wherein a majority of the realty affected by the assessment is contained. Upon the filing of the assessment with the clerk of said court notice is given by publication of the date of the hearing of objections to such assessment. It is provided that the court shall hear objections to the assessment and render a decision thereon, which shall be final and conclusive (Stats. 1919, pp. 1092, 1095, sec. 12), and from which no appeal can be taken and no new trial can be granted (sec. 8, p. 1094). This proceeding is to be heard before three judges of the superior court selected by the Governor from counties not within the drainage district.

Acting in accordance with the provisions of this legislation, the reclamation board has filed with the county clerk of the county of Sutter its assessment and the Governor has designated the three respondents to hear such proceedings, and they are now proposing to hear the proceedings, unless prohibited from so doing by this court.

It is claimed that the legislature had no authority to direct the Governor to nominate three of the judges of the superior court from counties other than the one in which the proceeding is filed to hold such court. This may be con-

ceded, and yet if the Governor had the authority to do so, under the constitution, without the request or direction of the legislature, and he has exercised that authority by the appointment of the respondents, we need not concern ourselves with the question of whether or not the legislature has any power to enact such a statute.

We will first consider the authority of the Governor under the constitution itself. Section 8 of article VI of the constitution provides that a judge of any superior court may hold a superior court *in any county*, at the request of a judge of the superior court thereof, *and upon the request of the Governor it shall be his duty so to do*. While, no doubt, the ordinary course of procedure has been for the Governor to name a judge of another superior court to sit for or in the place of some disqualified judge of the county in which he is requested to sit, it is clear from the constitution that any superior court judge of the state of California can hold a superior court in any county of the state of California when requested so to do by the Governor. The number of judges of the superior court in the county to which he is assigned by the Governor is thus increased. And, if the Governor, in the exercise of his prerogative, assigns three judges to a given county in addition to those provided by the constitution and legislature for the county, the number of judges who can hold separate sessions of the superior court in the county is thus increased by the number so assigned by the Governor to the county. In addition to the number of superior court judges provided by the legislature and elected by the people and those acting upon the request of the Governor, the constitution provides for judges *pro tempore* to try specific cases upon the agreement of the parties thereto. This matter of *pro tempore* judges is only germane to the discussion in that it shows that there may be many more judges exercising the power and authority of superior court judges in a given county at a given time than those designated in the constitution or by the legislature. For instance, in Los Angeles County the constitution provides for two superior court judges (art. VI, sec. 6). This number has been increased by the legislature to twenty-three (Stats. 1921, p. 1177).

[1] The Governor of the state is thus authorized to temporarily increase the number of superior court judges in a

county by a request that judges from other counties sit within that county as superior court judges.

Before the latest increases in the number of judges of the superior court in Los Angeles and San Francisco several extra sessions of the superior court were held simultaneously with and in addition to all the usual departments of the superior court. Sometimes as many as three or four extra sessions were held at one time. Superior court judges for such extra sessions were designated by the Governor from other counties and his authority to do so has never been questioned—indeed, in view of the plain language of the constitution it could not well be questioned. It is, therefore, apparent that there is nothing illegal in the selection by the Governor of the respondents to sit in the county of Sutter as superior court judges. [2] Assuming that the matter involved is a judicial question now pending before the superior court of the county of Sutter, as the statute expressly declares, and that the respondents have severally been selected to hold court in that county, it is obvious that the court has jurisdiction of the matter in question and that the respondents acting as judges of that court have jurisdiction to proceed to dispose of the matter.

Before considering the question as to whether or not the three respondent judges can sit together and hear the proceedings, a preliminary question should be mentioned.

[3] The judge of the superior court of the county of Sutter is disqualified to hear these proceedings by reason of subdivision 5 of section 170 of the Code of Civil Procedure, which disqualifies a judge of a county from hearing such proceedings, when they affect or relate to any real property within his county. This provision has been held constitutional (*Sacramento & San Joaquin Drainage Dist. v. Rector*, 172 Cal. 385, [156 Pac. 506]). From this it follows that the judge of the superior court of the county of Sutter, elected by the people thereof, is disqualified to try these proceedings and that the three respondents properly assigned by the Governor to that county are each qualified and empowered to dispose of the matter.

So far we have considered only the authority of the Governor to assign these judges to the superior court of Sutter County. When so assigned they derive their powers from the constitution itself. It remains to consider the ques-



tions of whether or not they can sit together and dispose of the matter and whether the legislature has any authority to direct that they shall do so. This involves a further consideration of the terms of section 8 of article VI of the constitution. This section provides: "There may be as many sessions of a Superior Court at the same time as there are judges thereof, including any judge or judges acting upon request, or any judge or judges *pro tempore*. The judgments, orders, acts and proceedings of any session of any Superior Court held by *one or more judges acting upon request*, or judge or judges *pro tempore*, shall be equally effective as if the judge or all of the judges of such court presided at such session." (Italics ours.) Section 7 of the same article provides as follows: "In any county, or city and county, other than the City and County of San Francisco, in which there shall be more than one judge of the Superior Court, the judges of such court may hold as many sessions of said court at the same time as there are judges thereof, and shall apportion the business among themselves as equally as may be," while, in the city and county of San Francisco, by the terms of section 6 of article VI of the constitution, it is also provided that there may be as many sessions of said court at the same time as there are judges thereof, it is provided that they shall select a presiding judge, who shall distribute the business of the court among the judges thereof and prescribe the order of business. It is then provided, and this provision would seem to be applicable to all superior courts, "The judgments, orders, and proceedings of any session of the Superior Court *held by any one or more of the judges* of said courts, respectively, shall be equally effectual as if *all the judges of said respective* courts presided at such session." (Italics ours.) [4] From these sections it is apparent not only that there may be as many sessions of the court as there are superior court judges in the county, including those assigned thereto by the Governor and those acting *pro tempore*, but also that all of these judges can sit together at one time for the trial of the case, hence, the provision that the decision of one judge sitting at a separate session of the superior court is equally effective as though all the judges of the superior court were sitting and rendering judgment. The constitution also contemplates a session held



by "one or more judges" as well as by one, and by all. The authority is found in section 8, above quoted. "The judgments, etc., of any session of any superior court held by *one or more judges acting upon request*, or judge or judges *pro tempore*, shall be equally effective as if the judge or all of the judges of such court presided at such session." (Italics ours.) The question of whether or not the Governor has power to request three superior court judges to sit together and try a single case and thus impose upon them the obligation to do so is not necessarily involved in this proceeding, for if the three judges selected by the Governor and requested to sit in Sutter County become thereby invested with the authority so to do under the constitution, they can so act, if they so desire, by reason of their constitutional authority to sit together in the trial of a single case, and this it is alleged they propose to do.

It is provided in section 7 of article VI of the constitution, above quoted, that the judges of the superior court of counties other than San Francisco "shall apportion the business among themselves as equally as may be." If we concede that the legislature had no power to enact legislation requiring that a certain proceeding shall be heard before a session of the superior court presided over by three judges and that the statute so providing has no more effect than as a formal request by the legislature that it be done, and if we further concede that while the Governor has authority to name three judges and request that they sit in the county for the purpose of trying such a proceeding, that such request has no other effect than to create said judges for the time being judges empowered to hold sessions of the superior court in and for the county of Sutter, still if they then have the discretion to sit together for the consideration of a case or cases submitted to that court, and if they desire to accede to the request of the Governor and to the request of the legislature so to do, their consent so to do and their action in pursuance of such request and purpose constitutes them judges of the superior court of the county of Sutter authorized by the constitution to sit together for the disposition of any case or cases brought before them, including the case they are thus proceeding to try. There is, therefore, no ground for interference by us because of the alleged lack of power of the legislature to

create a department of the superior court of the county of Sutter for the purpose of trying such an action and no reason to consider the authority of the Governor to compel judges so to act. The question before us thus reduces itself to this simple proposition: Can three judges of the superior court of the county of Sutter sit together for the hearing of the proceeding in question? [5] To this question the constitution makes a plain answer, that three judges of the superior court may, if they choose, sit together for the purpose of hearing any proceeding over which the court itself has jurisdiction.

Other constitutional questions are raised by the petitioner. It is claimed that the legislature had no right to direct that two out of three judges may render a decision in the case. Unless the constitution authorizes two of the three judges to render a decision where three sit together, it is clear that the legislature had no power to make such a provision. [6] The general rule, however, is that where authority is conferred upon a court of more than one judge, the majority can render decisions of the court in the absence of express statutory or constitutional provision to the contrary. (15 Corpus Juris [Courts], sec. 362, p. 965; *Austin v. Harbin*, 95 Tenn. 598, [32 S. W. 826].) That question, however, is not involved here so far as the case has proceeded. The respondents have agreed to sit together and to try the same and so far have not been called upon to rule upon any matters involved in the case. If upon the conclusion of the case two judges take one view and one another, the question as to whether or not two of the three judges can decide the case would be important.

Petitioner contends that the filing of the assessment cannot be treated as the filing of a complaint to validate the assessment, for to do so would be to violate the constitutional provision prohibiting the legislature from special legislation relating to the practice of the courts. [7] This question need not be considered upon this hearing, for the reason that if the court has jurisdiction and authority to pass upon the validity of the assessment and the questions arising with relation thereto, the sufficiency of the complaint or document filed to invoke that jurisdiction is one to be determined by them upon the hearing and does not affect their

jurisdiction to pass thereon. (*Ex parte Ruef*, 150 Cal. 665, [89 Pac. 605].)

It is claimed that the legislation, which prohibits the granting of a motion for a new trial in such a proceeding and deprives the defeated party of a right to appeal, is unconstitutional for the reason that it constitutes a special rule of practice. If this be conceded, it is immaterial. That question will arise when the jurisdiction of the courts is invoked either upon a new trial or upon an appeal.

The respondents argue at length that in the exercise of their powers under the statute in question they are not acting as judges of the superior court, but as a special board selected for the purpose of determining the particular matter with relation to the assessments, and that while so acting they are merely one of the boards charged with *quasi*-judicial functions in the collection of a tax. [8] It is very clear that the legislature contemplated a court proceeding. It provided that the judicial proceedings to validate the assessment should be commenced in the superior court. It declared the proceedings to be judicial proceedings, and it is manifest throughout that the whole scheme was to have a judgment of the superior court affirming the validity of the bonds before they were issued and to permit no other attack thereon, and there is no doubt that the proceedings are in a large part judicial. While many interesting and important questions are thus raised by the petitioner, the only thing that we are called upon to decide, or can properly pass upon in this proceeding, is the jurisdiction of the respondents to proceed in the matter. It is clear that they have such jurisdiction. We are not concerned at the present time with their method of exercising that jurisdiction.

The writ will be denied.

Shaw, J., Sloane, J., Shurtleff, J., Angellotti, C. J., Lennon, J., and Lawlor, J., concurred.

[S. F. No. 9795. In Bank.—September 16, 1921.]

JOHN ANDERSEN et al., Petitioners, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF NAPA, et al., Respondents.

- [1] **DISMISSAL—FAILURE TO BRING CASE TO TRIAL IN FIVE YEARS—SECTION 583, CODE OF CIVIL PROCEDURE.**—The requirement of section 583 of the Code of Civil Procedure that an action shall be dismissed by the court in which it is pending on motion of the defendant, after due notice to the plaintiff, or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time be extended, is mandatory.
- [2] **ID.—DISCRETION.**—The trial court is without discretion to refuse an order of dismissal where it is made to appear that the action has not been brought to trial within the prescribed period and that no stipulation in writing to extend the time has been made.
- [3] **ID.—REMEDIES—MANDAMUS.**—*Mandamus* is a proper proceeding to enforce the provisions of section 583 of the Code of Civil Procedure, providing for the dismissal of an action if not brought to trial within five years after answer filed, where the parties have not stipulated in writing that the time be extended.
- [4] **ID.—QUESTION OF FACT—JUDICIAL DISCRETION.**—The mere condition that some question of fact must be determined before the court may act under a mandatory provision of law does not make the act dependent upon judicial discretion.
- [5] **STATUTE OF LIMITATIONS—DEATH OF PARTY—RUNNING OF STATUTE.** Where a cause of action arises in the lifetime of a person entitled to sue, his death does not interrupt the running of the statute of limitations in the absence of some statutory provision to the contrary, and this rule extends to the provisions of section 583 of the Code of Civil Procedure, which is in effect a statute of limitations upon the time for bringing a cause to trial.
- [6] **DISMISSAL—DEATH OF PARTY—SECTION 353, CODE OF CIVIL PROCEDURE.**—Section 353 of the Code of Civil Procedure, allowing the commencement of an action against the representatives of a deceased person, who dies pending the running of the statute, within a year after the issuing of letters testamentary or of administration on his estate, does not affect the running of the five-year period provided by section 583 of the Code of Civil Procedure after which an action must be dismissed if there is not a stipulation in writing extending the time for trial.

- [7] **ID.—RENEWAL OF MOTION AFTER DENIAL.**—Section 182 of the Code of Civil Procedure does not apply to the renewal of a motion denied for informality of the moving papers or proceedings, or in cases where leave to renew is given; nor does it go to the jurisdiction of the court to entertain a second motion. The penalty provided by section 183 of the Code of Civil Procedure is punishment for contempt and authority to the court to set aside an order obtained by a violation of the rule.
- [8] **ID.—UNAUTHORIZED MOTION — REMEDY.**—The proper practice in case of an unauthorized motion is to strike it from the files.

**PROCEEDING** in Mandamus to compel the dismissal of an action on the ground that it was not brought to trial within five years after answer filed. Writ granted.

The facts are stated in the opinion of the court.

E. L. Webber for Petitioners.

Percy King, Jr., for Respondents.

**SLOANE, J.**—This matter comes before this court for hearing from the district court of appeal of the third appellate district upon petition for writ of mandate to require the superior court of the county of Napa to dismiss an action under section 583 of the Code of Civil Procedure, for failure to bring the same to trial within five years after answer filed, in which action one Henry Weaver is named as plaintiff and the petitioners here, John Andersen, W. P. Austin, and Janie M. Andersen, are defendants. A dismissal was had as to other defendants for failure to serve them with summons within three years under the requirements of section 581a of the Code of Civil Procedure.

The action in question was commenced in December, 1914, and the answer of the defendants, who are petitioners here, was filed on the 27th of January, 1915.

The cause was never brought to trial, and no attempt to set a day for trial seems to have been made until the twenty-ninth day of November, 1920, which was some months after the expiration of five years from the date when answer was filed.

It is conceded in the record that no stipulation in writing was ever made extending the time prescribed by the statute.

[1] The requirement of section 583 of the Code of Civil Procedure that an action shall be dismissed by the court in which it is pending on motion of the defendant, after due notice to the plaintiff, or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time be extended, has repeatedly been held by this court to be mandatory. (*Romero v. Snyder*, 167 Cal. 216, [138 Pac. 1002]; *Larkin v. Superior Court*, 171 Cal. 719, [Ann. Cas. 1917D, 670, 154 Pac. 841]; *City of Los Angeles v. Superior Court*, 185 Cal. 405, [197 Pac. 79]; *Rio Vista Mining Co. v. Superior Court*, ante, p. 1, [200 Pac. 616]; *Ravn v. Planz*, 37 Cal. App. 735, [174 Pac. 690]; *Boyd v. Southern Pacific R. R. Co.*, 185 Cal. 344, [197 Pac. 58].)

[2] The trial court is without discretion to refuse an order of dismissal where it is made to appear that the action has not been brought to trial within the prescribed period and that no stipulation in writing to extend the time has been made.

[3] Under such conditions *mandamus* is a proper proceeding if no other plain, speedy, and adequate remedy exists. *Mandamus* has been frequently upheld to enforce this provision of the code. (*Larkin v. Superior Court*, supra; *Pistolesi v. Superior Court*, 26 Cal. App. 403, [147 Pac. 104]; *City of Los Angeles v. Superior Court*, supra.)

However, treating the question as open for consideration, we think the practice thus sanctioned is justified. There is no other speedy or adequate remedy provided. An appeal does not lie directly from an order refusing to dismiss the action; and to compel a defendant to submit to an unwarranted trial of the cause and then appeal from the judgment if adverse to him, would not afford speedy or adequate relief.

It was so held by this court in the opinion by Chief Justice Beatty in *White v. Superior Court*, 126 Cal. 246, [58 Pac. 451], involving the right to a writ of prohibition after refusal to dismiss an action under section 581 of the Code of Civil Procedure. It was there claimed that the writ of prohibition should not issue because petitioner had a plain, speedy, and adequate remedy by appeal in the

ordinary course of law from any judgment that might finally be rendered against him in the action. The opinion states: "Such remedy by appeal is, perhaps, plain, but can hardly be called speedy or adequate. Petitioner has a present right to the dismissal of the action as against himself, and the removal of the lien by which his property is encumbered, and such right cannot be protected or enforced by an appeal from a possible judgment in the action to foreclose." To the same effect is *Davis v. Superior Court*, 184 Cal. 691, [195 Pac. 390].

The proposition so strongly urged in behalf of respondent that *mandamus* will not lie in this proceeding because the matters submitted under the motion to dismiss called for the exercise of judicial and discretionary powers of the court, which cannot be called in question in this manner, is not maintainable.

As already pointed out, the requirement to dismiss after five years, in the absence of a stipulation in writing extending the time, is mandatory. There was no issue presented that the five years had not elapsed, or that there had been a stipulation made between the parties. If such an issue had been made and the court had found as a fact in the case that no answer had been filed, or that five years had not elapsed, or that there had been a written stipulation between the parties for an extension of time, it may be conceded that the decision of the court as to such facts could not be reviewed in this proceeding. But where the express mandatory conditions for a dismissal are clearly established, and without contradiction, the court was without discretion in the matter.

The distinction between a mandatory and discretionary act is illustrated by the two provisions of section 583. The first clause provides a discretionary ground of dismissal for want of diligent prosecution of an action after two years, and the action of the court in granting or refusing to dismiss could not be controlled by *mandamus* or *certiorari*, at least in the absence of clear abuse of discretion; while the second clause makes a fixed and arbitrary rule that requires the performance of "an act which the law specially enjoins" and which gives jurisdiction for the exercise of the writ of mandate under section 1085 of the Code of Civil Procedure.



[4] The mere condition that some question of fact must be determined before the court may act under a mandatory provision of law does not make the act dependent upon judicial discretion. No duty is enjoined by law which does not first require as a condition of its enforcement proof of the jurisdictional facts. The distinction may sometimes be confusing, but it is substantial.

The cases relied upon by respondents, and in the opinion of the learned court of appeal in this matter, involved the decision of the question of fact upon which the law imposed the duty to dismiss. In *People v. Pratt*, 28 Cal. 166, [87 Am. Dec. 110], *mandamus* was invoked to compel a dismissal by the trial court of an action on motion of the plaintiff under a provision of the old Practice Act corresponding to subdivision 1 of section 581 of the Code of Civil Procedure. The motion was opposed by defendant on the ground that he had filed a counterclaim for affirmative relief. The trial court had sustained the objection of the defendant to dismissal. This court, on the application for *mandamus*, says: "We do not think *mandamus* will lie in this case. The real and substantial question presented for the decision of the court by the motion to dismiss was whether the defendant had set up a counterclaim against the plaintiffs upon which he was seeking affirmative relief. If he had not, the plaintiffs were undoubtedly entitled to the judgment which they asked, otherwise not. The solution of that question depended upon the judicial reading and construction of the defendant's answer and the stipulation between the parties, and the effect of the latter upon the former. It was claimed on the part of the plaintiffs, first, that the counterclaim made in the answer could not be legally made in the action; and, second, that the counterclaim had been withdrawn by the force and effect of the stipulation. Both of these propositions were denied by the defendant, and in deciding them the judge acted judicially, not ministerially; and, having decided them according to the best of his ability, a *mandamus* does not lie to compel him to reverse his decision and render a different one." This is just such a case as we would have here if the trial court had denied a dismissal upon a showing and finding that a written stipulation extending time of trial had been made.



*People v. Superior Court*, 114 Cal. 466, [46 Pac. 383], was a case in which the people, in a *quasi*-criminal proceeding, had caused defendant's default to be entered on the ground that a verbal plea, entered as an answer to the complaint, was ineffective as an appearance, and applied to the court for a judgment on such default. The trial court held the plea sufficient and refused the application for judgment.

In denying a petition for a writ of mandate this court says: "But whether or not his plea of not guilty was a proper and sufficient plea is a question not here before us. That question was passed upon judicially by the court; and if it committed error in deciding that question, such error cannot be reviewed on *mandamus*."

If it had appeared in that case that no plea or answer at all had been made by the defendant, a question parallel to the one here might be presented.

Respondents, however, claim that the order of the trial court was based upon other facts in issue and upon which it passed judicially.

It might be said in answer to this that the only condition permitted by the statute to defeat petitioners' right to a dismissal after five years is the existence of a stipulation extending the time.

But, conceding that there may be equitable grounds of estoppel to the enforcement of the dismissal of an action under section 583 of the Code of Civil Procedure, as is, perhaps, intimated in *Larkin v. Superior Court*, *supra*, and *Los Angeles v. Superior Court*, *supra*, the question to be first presented to this court under a *mandamus* proceeding would be one of law, as to whether the facts pleaded and passed upon by the trial court constituted a sufficient ground for denying the motion to dismiss. It cannot be claimed that it is a matter within the discretion of the trial court to arbitrarily determine what extraneous circumstances will excuse a compliance with the statute.

In this instance the facts relied upon are that from a date within a month after the answer in the pending case was filed until after the five-year period had expired, there was no plaintiff in the action to bring the cause to trial. It is claimed that the plaintiff, Weaver, died about a month after

answer filed and there was no substitution of the personal representatives of the decedent as plaintiff in the action until after five years, and but shortly before this motion to dismiss was made. It appears that representatives of the estate of decedent, in the persons of executors of his last will, were appointed, qualified and acting at all times subsequent to May 14, 1915, which date was less than two months after his death.

We do not see how under this state of facts it can be held that there was any suspension of the running of the five-year limitation against decedent's estate.

[5] It is a familiar and well established rule of law that where a cause of action arises in the lifetime of a person entitled to sue, his death does not interrupt the running of the statute of limitations in the absence of some statutory provision to the contrary. (*McLeran v. Benton*, 73 Cal. 329, [2 Am. St. Rep. 814, 14 Pac. 879]; 25 Cyc. 1277; *Mereness v. Charles City Bank*, 112 Iowa, 11, [84 Am. St. Rep. 318, 51 L. R. A. 410, 83 N. W. 711]; *Tobias v. Richardson*, 26 Ohio C. C. 81; *Rowan v. Chenoweth*, 49 W. Va. 287, [87 Am. St. Rep. 796, 38 S. E. 544]; 17 R. C. L., p. 850.)

No reason is suggested, and we can think of none, why this rule should not extend in like manner to this provision of section 583. It is in effect a statute of limitation upon the time for bringing a cause to trial.

It is true that section 353 of our Code of Civil Procedure suspends the running of the statute as to time of commencing an action, after death of the person entitled to sue, for a period of six months, but there is no authority for extending this provision beyond the proceeding to which it applies; and if it were applicable to section 583, it would not relieve the situation for plaintiffs in this case, as the addition of six months to the five-year period of the statute would still leave them in default, the motion for dismissal not having been made for some ten months after the expiration of the five years.

[6] This case is not affected by the portion of section 353 of the Code of Civil Procedure invoked by respondents. That provision allows the commencement of an action against the representatives of a deceased person who dies pending the running of the statute within a year after the issuing of letters testamentary or of administration on his estate.

In the case of a deceased plaintiff the action must be commenced by his representatives within six months after his death.

It was incumbent upon the representatives of the estate of the deceased plaintiff to have the pending litigation brought to trial within the statutory period.

As further ground of objection to the issuance of a writ of mandate in this matter, respondents urge that the motion for dismissal was properly denied, for the reason that two previous motions based on the same grounds had been presented by these petitioners and denied by another judge of the same court, and that the motion before us was made in violation of the rule provided in section 182 of the Code of Civil Procedure. There is no transcript or record before us of the proceedings had on these previous motions. The petition for the writ of mandate on file here, however, purports to set out the substance of the prior petitions, and as the answer makes no denial of the correctness of the recitals, we assume they correctly state the facts.

It may be doubted therefrom if either of the former petitions stated facts sufficient to justify the relief provided by the second subdivision of section 583 of the Code of Civil Procedure. While the fact that five years had elapsed from the time of filing the answer in the original action could be ascertained from the dates given, the relief demanded was predicated upon the express statement that there had been a failure to set the cause for trial within five years of the date of the *commencement* of the action; and no allegation was made that there had not been a written stipulation extending the time. In denying the motion on these previous applications the trial court stated no grounds for its rulings.

It does not affirmatively appear that leave to renew the motion was not given.

[7] Section 182 does not apply to the renewal of a motion refused for informality of the moving papers or proceedings, or in cases where leave to renew is given; and, in any event, does not go to the jurisdiction of the court to entertain a second motion. The penalty is provided by section 183 of the Code of Civil Procedure, and is punishment for contempt, and authority to the court to set aside an order obtained by a violation of the rule.

[8] In any event, the proper practice in the case of an unauthorized motion is to strike it from the files. (*People v. Center*, 61 Cal. 191.) In the matter before us the motion on which this proceeding is based was the first which stated sufficiently the grounds for dismissal under the five-year provision of section 583. It was heard on the merits. The grounds upon which the denial was made are not set out further than in the statement of the court according to the petition here that it "had no jurisdiction to grant the same." Respondent's answer alleges that the motion was denied on the ground, "among others," that prior motions had been made in violation of the provisions of section 182 of the Code of Civil Procedure.

In view of the obvious fact that this motion was heard on its merits, and the extreme vagueness of other details relating to the previous motions, we prefer to dispose of it upon its merits here.

As heretofore pointed out, there has been a clear and unjustifiable failure on the part of the plaintiffs to bring this pending action to trial within five years after answer filed, and the motion to dismiss should have been granted.

A peremptory writ of mandate requiring the superior court of the county of Napa, and the judge thereof, to enter an order dismissing said action as to these petitioners is granted.

Shaw, J., Wilbur, J., Shurtleff, J., Lennon, J., Lawlor, J., and Angellotti, C. J., concurred.

[L. A. No. 6183. In Bank.—September 16, 1921.]

JOHN S. CHAMBERS, as Controller, etc., Respondent, v.  
JULIA A. HATHAWAY, Respondent and Appellant;  
UNION TRUST & SAVINGS BANK OF PASADENA,  
as Administrator, etc., Respondent.

- [1] RESIDENCE—QUESTION OF INTENT.—Where a person has two dwellings in different places and resides a part of his time in one place and a part of the time in another alternately, the question which of the two places is his legal residence is almost altogether a question of his intent.
- [2] EVIDENCE—REGISTERING AS VOTER—AFFIDAVIT—DECLARATION.—An affidavit made for the purpose of registering as a voter in which affiant states that his residence is at a certain place constitutes a declaration by affiant that at that time his legal residence is in the place indicated, and if unexplained and there is no other evidence of a subsequent change of intent, it would be sufficient to uphold a finding to that effect in a proceeding by the state controller, under the Inheritance Tax Act, for the collection of inheritance tax; but where the evidence shows that after making the affidavit he formed a decided intention to have his residence at his former home in a different state which he used repeatedly as a residence, the union of act and intent as required by the Political Code was sufficiently manifested to establish his residence in the latter place.
- [3] APPEAL—PROCEEDING FOR COLLECTION OF INHERITANCE TAX—INHERITANCE TAX ACT.—There is a right to appeal from the decision in a proceeding under the Inheritance Tax Act (Stats. 1913, p. 1078) by the state controller for the determination of liability to taxation under the act.

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Rives, Judge. Reversed.

The facts are stated in the opinion of the court.

Anderson & Anderson and W. W. Wight for Appellant.

John W. Carrigan, Edwin H. Pennock, James L. Atteridge and Robert A. Waring for Respondent.

SHAW, J.—This is a proceeding by the state controller, under the Inheritance Tax Act, for the collection of inheritance tax alleged to be due upon the estate of Frederick N.

Finney, deceased. Julia A. Hathaway is interested in said estate as one of the executors of the will of said decedent under an appointment by the court of probate in the state of Wisconsin, and also as a beneficiary under his will. She alone has appealed from the decree of the court below in favor of the controller.

The complaint alleges that Finney died the owner of notes, bonds, and stocks of the value of one hundred and thirty-eight thousand three hundred dollars, and other property, and that at the time of his death he was a resident of Los Angeles County, California. The answer denied the allegations as to the residence of the decedent and averred that at the time of his death he was a resident of Milwaukee, Wisconsin. Upon this issue the court below decided in favor of the plaintiff. The sole point for consideration upon this appeal is the question whether the decision on that issue is supported by substantial evidence.

The rules for determining the place of residence of a person are thus stated in the Political Code (sec. 52):

“Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

“1. It is the place where one remains when not called elsewhere for labor or other special temporary purpose, and to which he returns in seasons of repose;

“2. There can only be one residence;

“3. A residence cannot be lost until another is gained . . . ;

“7. The residence can be changed only by the union of act and intent.”

Clauses 4, 5, and 6 of the above section have no application to the present case.

[1] Where a person has two dwellings in different places and resides a part of his time in one place and a part of the time in another alternatively, the question which of the two places is his legal residence is almost altogether a question of his intent. “If a party has two residences, that will be esteemed his domicile which he himself selects or deems to be his home, or which appears to be the center of his affairs, or where he votes or exercises the rights and duties of a citizen.” (9 R. C. L. 558; see, also, 19 Corpus Juris, p. 401.)

Upon the trial in the lower court the parties stipulated that Finney was and had been a resident of the state of Wisconsin for many years prior to 1907, and that from that time until his death on March 13, 1916, he passed a part of each year in South Pasadena, California, and a part of each year in Milwaukee and the east, usually spending from October or November to May or June in South Pasadena and the remainder of the time in Milwaukee and the east. The evidence shows that he built a house of fourteen rooms in Milwaukee, Wisconsin, in the year 1884 for his permanent dwelling, and that he continuously maintained that house, having therein three or more servants and all of his furniture and a large number of curios and other articles which he had collected in his numerous travels; that his wife died in 1899, and that thereafter during the remainder of his life his son and family remained in the house with him and took care of the same, but that he paid all the expenses of the establishment; that when in Milwaukee he lived in that house. Upon coming to California in the fall of 1907 he rented a furnished house for the winter and lived in it with a Miss Renold, who had been his housekeeper in Wisconsin. In 1908 he came again and rented a furnished house, which was kept for him by Miss Renold. During that visit, some time in 1909, she purchased a house, in which she continued to reside thereafter until her death in August, 1915. During his subsequent sojourns in California he lived in her house. In 1912, because of her financial distress, he purchased the house from her and continued to own the same until his death.

It is apparent, therefore, that the facts make a case where a person has two residences, either of which might be his lawful residence, according to his intention, and that the question which one was his lawful residence at the time of his death depends altogether upon his intention regarding them. Under the rule above stated, if his intent was to have his Milwaukee home as his residence, that was the place of residence at his death. If his intent was to make his California house his lawful residence, that was his lawful residence at the time of his death.

We think it must be conceded that upon all the facts in the case his intent, so far as it is to be deduced from his acts and conduct, shows that the Milwaukee residence was



his real home. It was a large establishment; he had built and kept it for a permanent home, he requested his son and wife to live in it and keep it for his use, and he had paid the expenses of maintaining it, even purchasing a farm near the city, on which a tenant lived, who produced milk and vegetables for the family use. His business headquarters were in Milwaukee. He kept safe deposit boxes there in which he stored all his stocks and bonds and other valuable papers. His son or his secretary had access thereto and in his absence they cut off the coupons from the bonds, received the dividends on his stocks, and deposited the same to his bank account in Milwaukee banks. He kept in a California bank only such funds as were required for his expenses while living there. All of his investments were made from Milwaukee and during his absences the business was carried on by his son and secretary. He had a safe deposit box in California, but kept there only such papers as he desired to have with him while he remained away from his main place of business. Under the circumstances of the case the fact that he lived in California during the greater portion of each year is of no substantial significance with respect to the question of his intent. (19 Corpus Juris, p. 403.) The evidence shows that in 1907 he decided to spend the winters in California because the severity of the winters in Wisconsin was detrimental to his health and comfort in his declining years. It was for this reason he came and for this reason that he continued to come yearly thereafter. The fact that he rented houses in California and that he brought and kept there during his stay his two driving horses and that he also had an automobile there was of small significance, considering his wealth and station. He was a man who was given to travel, even in his later years. In the year 1912, being then of the age of eighty, he spent two months traveling in Europe. His last illness occurred while he and his daughter were on a trip to Honolulu, and he died in San Francisco shortly after his return therefrom. All these circumstances go to indicate that his sojourn in California was not in pursuance of a design to change his former residence.

The only direct evidence of his intent on the subject is found in certain declarations shown to have been made by him. That upon which the plaintiff relies, and which is



practically the only one favorable to the plaintiff, was a declaration made by him on May 13, 1912, for the purpose of registering as a voter in South Pasadena, Los Angeles County, California. In that affidavit he stated that his place of residence was in South Pasadena and that he "will have resided in this state one year, and in said county ninety days and in said precinct thirty days next preceding the next ensuing election, and will be an elector of said county at the next succeeding election." The affidavit contains blank forms for noting whether or not the person voted at any election thereafter. The record shows no entries indicating any vote by Finney.

[2] This affidavit constitutes a declaration by Finney that at that time his residence was in South Pasadena, and it must be understood as a declaration that that was his legal residence at that time. If it had remained unexplained by him and there was no other evidence of a subsequent change of intention, this, of course, would be sufficient to uphold the finding of the court. The decedent, however, subsequently explained the reason for this registration and stated that he had decided not to change his residence to California, and the record contains abundant evidence that thereafter he had the fixed intent to be a resident of Milwaukee, Wisconsin. Afterward, in that same year of 1912, during a trip to Europe with an old friend, speaking of his house in Milwaukee, he said that he thought its value would not then exceed forty-five thousand dollars; that Milwaukee was his home, and that during his lifetime he had no disposition to give up that home or dispose of that residence. In December of 1913, his son, John, had written to him, and in reply he wrote from South Pasadena, December 18th, saying: "I did intend taking citizenship here last year but their politics were so bad that I concluded not to do so. . . . I have decided not to change my residence." In March, 1915, he purchased some land in Hennepin County, Minnesota, and he desired to have the title thereto registered under the law of Minnesota. He made an application therefor, duly sworn to in accordance with that law, in which he stated that his residence was No. 34 Prospect Avenue, city of Milwaukee, county of Milwaukee, state of Wisconsin. In October of that year he executed two deeds for his two lots in California, in each of which he recited that his resi-

dence was Milwaukee, Wisconsin. In the summer of 1915 one of his old friends, who at that time lived in California, visited Finney in Milwaukee at his residence there. To him Finney said that he had always kept his house in Milwaukee open and intended to do so as long as he lived. In March, 1915, he executed his last will and therein recited that he was "of the city of Milwaukee in the state of Wisconsin." His will contained provisions for charitable bequests of more than one-third of his estate, and which, as to the excess, would have been void if executed in California, and with respect to the personal property which attends the person would have been ineffective as a disposition thereof if his residence was in California. This will was drawn by an attorney. It was discussed by him with the testator for several weeks before its execution. The attorney stated to him that the bequests made in the will of more than one-third of the estate to eleemosynary institutions would be in conflict with the California law if California was his residence, and thereupon Finney stated positively and repeatedly that he was a resident of Milwaukee and had always maintained his home there, and that his California house was merely for his use in winter. If he had been a resident of California during these years it would have been his duty in giving in his list of property in California to have included therein all his choses in action, and they appear to have been of great value. The evidence shows that this property was taxed regularly every year in Wisconsin and there is no evidence of any taxation thereof in California. As the case was tried in Los Angeles, California, where the records of such taxation were at hand, an inference arises that, since no evidence was given, no record of that character existed. (Code Civ. Proc., sec. 2061, subd. 6.)

This constitutes clear and convincing evidence that whatever his design may have been at the time he registered for voting in California in 1912, he afterward formed a decided intention to retract that decision and to have his residence at his old home in Milwaukee. As he was repeatedly present in that home, using it as a residence after the year 1912, the union of act and intent as required by our Political Code was sufficiently manifested thereby, and his residence in Milwaukee, Wisconsin, was thereby established. There is

no contradiction whatever of this evidence as to the subsequent intent and we deem it to be conclusive on the subject. The court below should have held that at the time of his death he was a resident of the city of Milwaukee, Wisconsin, and not of the state of California.

[3] We think there is no doubt of the right to appeal from the decision in a case of this character. The code authorizes an appeal from a final judgment in any special proceeding. (Code Civ. Proc., sec. 963, subd. 1.) Section 17 of the Inheritance Tax Act (Stats. 1913, p. 1078) authorizes the state controller to institute a special proceeding for the determination of the liability to taxation under the act of any property which has been transferred, in cases where there is no proceeding pending in any court of this state, wherein the taxable character of such property could be determined, and it provides that in such a proceeding there may be a contest by persons interested in the property transferred, and that the court thereupon may determine whether or not the property is subject to such tax. The act (sec. 1) defines the word "transfer," and as so defined it includes the passing of property by will. The petition of the state controller stated the facts which bring the proceeding within the class thus authorized. The determination of the question whether or not the property is subject to the tax is the principal object to be accomplished by the proceeding. The decree or judgment on that subject is the final judgment sought. The act in effect provides that if such judgment is against the controller, the proceeding is terminated absolutely. If it is in his favor, the act provides that the court must so adjudge. The status of the property as property subject to taxation in this state is thereby finally determined, and section 17 declares that in that event "the same shall be appraised and taxed as in other cases." The subsequent appraisement and collection of the tax are merely the process of enforcement of the judgment so given. In such cases the right of appeal is given by section 963 aforesaid.

The judgment is reversed.

Wilbur, J., Shurtleff, J., Lennon, J., and Angellotti, C. J., concurred.

[L. A. No. 6154. In Bank.—September 17, 1921.]

**M. P. FLICKINGER, Appellant, v. O. C. HECK et al.,  
Respondents.**

- [1] **CONTRACTS—OPTION—ACCEPTANCE—ELECTION.**—An option contract may be regarded as embodying an offer, and when the optionee, or person to whom the offer is made, signifies his desire to accept in accordance with the terms of the option, the optionor, or person making the offer, becomes obligated to perform. This acceptance of the offer contained in the option contract is called "election" and gives rise to a subsequent contract between the parties to buy or sell, or perform whatever other acts have been specified in the option contract. The particular act or acts which constitute an election may be fixed by the terms of the option, as also the time when, the place where, and the person to whom it shall be made; and the language of the contract itself controls as to what act or acts constitute an election.
- [2] **ID.—SALE OF STOCK—OPTION—ELECTION.**—Where an option clause in a contract for the sale of stock provided that the first parties would at the option of the second party, at the expiration of a certain time, repurchase from the second party the stock sold for the amount of the purchase price on the exercise of said option, provided the second party should give ten days' notice before expiration of the time of his intention to exercise said option, the giving of the notice gave rise to a binding bilateral contract for the repurchase of the stock.
- [3] **ID.—DEMAND—TENDER.**—Under such a contract all that was required of the second party, after due notice of election, was to offer to perform, by tender and demand, on or within a reasonable time after the date upon which the first parties' obligation to perform arose.
- [4] **ID.—TIME FOR DEMAND.**—The general rule is that where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made, and that, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations will be deemed reasonable.
- [5] **ID.—STATUTE OF LIMITATIONS.**—Under such a contract a cause of action arose against the first parties upon their refusal to accept a tender and comply with a demand of the second party, and where the action was brought in less than four years thereafter, it is not barred by subdivision 1 of section 337 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge. Reversed.

The facts are stated in the opinion of the court.

Kaye & Siemon, W. W. Kaye, L. E. Nathan and Alfred Siemon for Appellant.

George E. Whitaker for Respondent.

LENNON, J.—This is an appeal by plaintiff, M. P. Flickinger, from a judgment for the defendants in an action to recover the purchase price of certain corporate stock.

On March 1, 1910, J. C. Flickinger purchased twenty-five shares of corporate stock from the defendants and paid therefor the sum of two thousand five hundred dollars. In part consideration for this purchase and other acts on the part of J. C. Flickinger, defendants entered into a written agreement with said Flickinger whereby they undertook to repurchase the said stock for two thousand five hundred dollars at Flickinger's option at the expiration of one year from March 1, 1910. It was provided that Flickinger was to give ten days' notice before the expiration of the year of his intention to exercise the option. On February 17, 1911, Flickinger gave the ten days' notice of his intention to require a repurchase of the stock by defendants and thereafter, in September, 1911, brought suit against defendants to recover the purchase price of the stock. Although Flickinger served the ten days' notice upon defendants, he had not, at the commencement of his action, followed up the notice with a technical tender of the stock to and demand of the purchase price from defendants. For this reason he was nonsuited and on appeal the nonsuit was upheld by this court. (*Flickinger v. Wrenn Investment Co.*, 172 Cal. 132, [155 Pac. 627].) Thereafter, having made a tender of the stock to defendants and demanded the purchase price on November 29, 1912, J. C. Flickinger assigned his rights to M. P. Flickinger, plaintiff herein, who instituted the present proceedings.

The complaint sets forth four causes of action. The trial court sustained a demurrer to the first cause of action upon the ground that it was barred by subdivision 1 of section

337 of the Code of Civil Procedure, and, upon the other causes of action, made findings to the effect that the option in question was not exercised at the expiration of one year from the date of the contract and that all three causes of action were barred by subdivision 1 of section 337 of the Code of Civil Procedure. Plaintiff appeals upon the grounds that the court erred in finding that the option was not exercised at the expiration of a year from the date of the contract and holding that the action was barred by the statute of limitations.

The controversy over these two points resolves itself into the issue whether it was essential to an exercise of the option that the stock be tendered to defendants and a repurchase demanded at the expiration of one year from the date of the contract, to wit, on the first day of March, 1911. If such be the case, then the option was never exercised, for the tender was not made by plaintiff's assignor until November 29, 1912, and, moreover, even if a tender had been made on March 1, 1911, an action for the refusal to comply with the terms of the option would be barred by March 1, 1915, whereas the present complaint was filed in May, 1916. The question upon which the rights of the parties depend is, therefore, whether an effective tender and demand might be made after March 1, 1911. This question was not passed upon in *Flickinger v. Wrenn Investment Co.*, *supra*. In that case it was decided that an action was not maintainable in the absence of any tender of the stock or demand of the purchase price and plaintiff's assignor was nonsuited upon the ground that "this tender and demand he had never made, and the evidence showed that he had never made it." Therefore, in the present case, it is necessary to proceed upon the premise that a tender and demand are essential to put defendants in default and prerequisite to the maintenance of the present suit. To that extent only does the previous decision operate as *res adjudicata*, the question as to the precise time within which a valid tender and demand may be made coming before this court for the first time on this appeal.

[1] An option contract may be regarded as embodying an offer. When the optionee, or person to whom the offer is made, signifies his desire to accept in accordance with the terms of the option, the optioner, or person making the offer,

becomes obligated to perform. This acceptance of the offer contained in the option contract is called "election" and it gives rise to a subsequent contract between the parties to buy or sell, or perform whatever other acts have been specified in the option contract. (*Pennsylvania Min. Co. v. Smith*, 207 Pa. St. 210, [56 Atl. 426].) "The particular act or acts which constitute an election may be fixed by the terms of the option, as also the time when, the place where, and the person to whom it shall be made." (James on Law of Option Contracts, secs. 801, 817.) The language of the contract itself controls as to what act or acts constitute an election. Under the terms of one option, election may consist of a tender of the property to be sold or purchase price to be paid; under the terms of another option, it may consist of a mere notice of election to purchase or sell, leaving payment of the price and delivery of the property as subsequent matters in performance of the executory contract raised by the election. (*Breen v. Mayne*, 141 Iowa, 399, [118 N. W. 441]; *Byers v. Denver Circle R. Co.*, 13 Colo. 552, [22 Pac. 951]; James on Law of Election Contracts, sec. 817.) If the tender of property or purchase price constitutes an "election," it must be performed in order to turn the offer contained in the option contract into a contractual obligation and, if not performed as provided in the option contract, no subsequent contractual liability arises; if the tender is merely in performance of the contract created by a notice of election, it is controlled by the terms of that contract and "in the absence of anything in the contract itself, the obligation of the parties in the performance of the contract is governed by the law applying generally to bilateral contracts for the purchase and sale of property . . .". (*Cates v. McNeil*, 169 Cal. 697, [147 Pac. 944].)

[2] The option clause in the instant case reads as follows: "the said first parties [defendants] will at the option of the party of the second part, at the expiration of one year from the date hereof purchase from the said second party the said twenty-five shares of the capital stock of the said corporation for said sum of \$2500 Gold Coin of the United States to be paid by the said parties of the first part to said second party at the exercise of said option provided that said second party may give ten days' notice before the expiration of said year of his intention to exercise said option."



In other words, if the second party, plaintiff's assignor, desired the defendants to repurchase the stock, he was to give notice, ten days before the expiration of one year from the date of the contract, of his acceptance of defendants' offer. This notice, which was given as required, gave rise to a binding bilateral contract for the repurchase of the stock. [3] There is nothing in the option clause which requires a tender or demand in order to constitute an election to accept the option. The tender of the stock to defendants was an act in performance of the contract created by the election and, while necessary to put defendants in default under this subsequent bilateral contract, it was a step in pursuance of the contract, not in its creation. (*Cates v. McNeil, supra.*) The time for performance is not specified by the parties. If plaintiff's assignor elected to accept the option, defendants' obligation to repurchase arose at the "expiration" of the year, March 1, 1911, but there is no requirement that the terms of the contract must be performed on the day upon which the obligation arises. In other words, the contract does not provide that the stock must be tendered or delivered or payment made on the day upon which defendants' duty to repurchase comes into existence. Consequently, all that was required was that, after due notice of election, plaintiff's assignor offer to perform, by tender and demand, on or within a reasonable time after March 1, 1911, the date upon which defendants' obligation to perform arose. (*Cates v. McNeil, supra; Breen v. Mayne, supra; Pennsylvania Min. Co. v. Smith, supra.*) [4] "The general rule is that where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made, and that, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations will be deemed reasonable." (*Vickrey v. Maier*, 164 Cal. 384, 389, [129 Pac. 273, 275].) The demand in the instant case was made within less than two years after the right to make it arose. "Where a party may call for the performance of the agreement upon the part of another only by a tender or offer to perform his own agreement, there can be no breach of the contract by



the one until such offer or tender by the other, and the statute will not begin to run until that time." (25 Cyc. 1210; *Vickrey v. Maier*, *supra*.) [5] A right of action arose against defendants, therefore, in November, 1912, upon their refusal to accept the tender and comply with the demand, and the present action having been brought within less than four years thereafter, it is not barred by subdivision 1 of section 337 of the Code of Civil Procedure.

The judgment is reversed.

Sloane, J., Shaw, J., Shurtleff, J., Wilbur, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Shaw, J., who was absent.

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[S. F. No. 9770. In Bank.—September 19, 1921.]

FRED W. LAKE, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, etc., et al., Respondents.

- [1] QUIETING TITLE—APPEAL BY PART OF DEFENDANTS—REVERSAL OF JUDGMENT—NONAPPEALING DEFENDANTS.—In an action to quiet title in which plaintiff's title is based on a school land certificate and the defendants, who are tenants in common, claim under another certificate, the controversy being as to the validity of the respective certificates, where the lower court held plaintiff's certificate valid giving him judgment, the appellate court has no power in reversing the judgment upon an appeal by part of the defendants only to order a retrial of the issues as to all of the defendants.
- [2] ID.—RIGHTS OF NONAPPEALING DEFENDANTS—INTERESTS NOT ADVERSE.—While the rights of nonappealing defendants in such a case would be affected by a reversal of the entire judgment, their interests were in no sense adverse to the appellants, and their rights would not be affected by a reversal of the judgment as to the appealing defendants, as the rights of the several defendants were separate and distinct.
- [3] ID.—RETRIAL—UNDIVIDED INTERESTS.—A retrial of such case can be had with relation to the undivided interest claimed by the ap-

pealing defendants without in any wise affecting the rights of the plaintiff and nonappealing defendants as determined by the previous judgment.

- [4] **APPEAL—REVERSAL—APPLICATION OF ORDER.**—The broad expression “the judgment is reversed” will be confined to the issues arising upon the appeal and the parties appealing.
- [5] **ID.—APPEAL FROM PORTION OF JUDGMENT.**—An appeal from a judgment by some of the defendants, although the notice of appeal is general in its terms, is of necessity an appeal from only that portion of the judgment which injuriously affects the appealing defendants, and is thus, in effect, an appeal from a portion of the judgment—that is to say, the portion of the judgment adverse to their interests, unless the reversal or modification of the whole judgment is essential to protect the interests of the appealing defendants.
- [6] **ID.—REVIEW OF PART OF JUDGMENT—JURISDICTION.**—Upon an appeal from a portion of a judgment only the appellate court has no jurisdiction to review any part of the judgment, except the part to which the appeal is directed, and an order of reversal, although general in terms, will be construed to apply only to the part brought up for review.

**APPLICATION for Writ of Prohibition. Writ denied.**

The facts are stated in the opinion of the court.

R. P. Henshall for Petitioner.

Fabius M. Clarke for Respondents.

**WILBUR, J.**—This is an application for a writ of prohibition to prevent the defendant from proceeding with the trial of the case of *Lake v. Sterling Development Co.* and others as to certain defendants, upon the ground that the court is precluded from trying the issues between plaintiff and such defendants by reason of a previous adjudication of those rights from which the defendants referred to failed to appeal. The other defendants took an appeal and on such appeal a judgment was rendered reversing the judgment. The question is as to the effect of the judgment of reversal upon the rights of the defendants who failed to take an appeal.

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6. Effect of reversal where part only of judgment is appealed from, note, *Ann. Cas.* 1913E, 1323.

The order of the appellate court, "Judgment reversed," taken literally, reversed the entire judgment and sent the case back for a new trial. (2 Hayne on New Trial and Appeal, sec. 299, subds. 2 and 4.) This the respondent claims is the effect of the judgment. The suit was one brought by Lake to quiet his title to certain land described in the complaint. The plaintiff's title was based upon a school land certificate issued to one Brackett and referred to as the Brackett certificate, while the title claimed by all the defendants, who were tenants in common, was derived from a certificate issued to one Phillips, whose heirs and successors are the defendants in the case. The controversy between the parties was as to the validity of the respective certificates upon which their respective claims of title depended. The lower court held the Brackett certificate valid and gave judgment in favor of the plaintiff. Upon the appeal this certificate was declared void, from which it followed that the judgment was erroneous not only as to the defendants who appealed but also as to those who failed to appeal. Under these circumstances, if the appellate court had jurisdiction to render a judgment reversing the case and sending it back for a trial of the issues between all the parties thereto, it is clear that such an order was made and would be in furtherance of justice. The terms of the judgment rendered, unless limited by the nature of the questions presented, or because of a lack of jurisdiction, was a direct decision that the entire judgment be reversed and an implied order for the retrial of the entire case. There is nothing in the nature of the case to justify the conclusion that it was the intention of the appellate court to limit the reversal to the five-twelfths of the property owned by the defendants who served notice of appeal. That it was the intention of the district court of appeal to reverse the entire judgment is further manifested by the fact that in the briefs in the district court of appeal and in the petition for a transfer to this court the plaintiff, the petitioner herein, particularly called attention to the fact that some of the defendants had not appealed, and asked that the judgment on appeal be rendered in such form that as to the nonappealing defendants the plaintiff's judgment would be affirmed. The request was not granted.

[1] The question, then, is whether or not the appellate court had the power under the circumstances of this case to direct a retrial of the issues as to all the defendants. In considering this question of jurisdiction it should be stated that the defendants not only appeared separately by separate answers, but also filed cross-complaints setting up their respective undivided interests. The cross-complaints were ignored in the findings and judgment for the reason that the judgment adjudicating the validity of the plaintiff's title was in effect a denial of the prayer of the cross-complaint. The appealing defendants served notice of appeal upon the plaintiff and upon their codefendants. If the nonappealing codefendants were in any sense adverse parties to the appealing codefendants, it may be that the appellate court had jurisdiction over the entire judgment. [2] While it is true that the rights of the nonappealing defendants would be affected by a lawful reversal of the entire judgment, their interests were in no sense adverse to the appellants. Their rights would be in no sense affected by a reversal of the judgment as to the appealing defendants. (Code Civ. Proc., sec. 940; *Johnson v. Phenix Ins. Co.*, 146 Cal. 571, [80 Pac. 719]). The rights of the several defendants, although cotenants, were as distinct as though each owned a separate and distinct piece of property within the limits of the certificate upon which the plaintiff based his right of recovery. The judgment having declared that the several defendants were without right or title in or to the particular property claimed by them, they could not be injuriously affected by any judgment rendered on an appeal, where the only remedy sought by the appealing defendants was a reversal of the judgment. The only difficulty in the case here is that the defendants who are now seeking a retrial of the issues as to them are seeking to reap where they have not sown.

[3] So far as the retrial of the case is concerned there is no reason why that trial cannot be had with relation to the undivided interest claimed by the appealing defendants without in anywise affecting the rights of the plaintiff and nonappealing defendants as determined by the previous judgment. [4] The broad expression "the judgment is reversed" will be confined to the issues arising upon the appeal and the parties appealing. (*Whalen v. Smith*, 163 Cal. 360, [Ann. Cas. 1913E, 1319, 125 Pac. 904].) [5] An appeal

The order of the appellate court, "Judgment reversed," taken literally, reversed the entire judgment and sent the case back for a new trial. (2 Hayne on New Trial and Appeal, sec. 299, subds. 2 and 4.) This the respondent claims is the effect of the judgment. The suit was one brought by Lake to quiet his title to certain land described in the complaint. The plaintiff's title was based upon a school land certificate issued to one Brackett and referred to as the Brackett certificate, while the title claimed by all the defendants, who were tenants in common, was derived from a certificate issued to one Phillips, whose heirs and successors are the defendants in the case. The controversy between the parties was as to the validity of the respective certificates upon which their respective claims of title depended. The lower court held the Brackett certificate valid and gave judgment in favor of the plaintiff. Upon the appeal this certificate was declared void, from which it followed that the judgment was erroneous not only as to the defendants who appealed but also as to those who failed to appeal. Under these circumstances, if the appellate court had jurisdiction to render a judgment reversing the case and sending it back for a trial of the issues between all the parties thereto, it is clear that such an order was made and would be in furtherance of justice. The terms of the judgment rendered, unless limited by the nature of the questions presented, or because of a lack of jurisdiction, was a direct decision that the entire judgment be reversed and an implied order for the retrial of the entire case. There is nothing in the nature of the case to justify the conclusion that it was the intention of the appellate court to limit the reversal to the five-twelfths of the property owned by the defendants who served notice of appeal. That it was the intention of the district court of appeal to reverse the entire judgment is further manifested by the fact that in the briefs in the district court of appeal and in the petition for a transfer to this court the plaintiff, the petitioner herein, particularly called attention to the fact that some of the defendants had not appealed, and asked that the judgment on appeal be rendered in such form that as to the nonappealing defendants the plaintiff's judgment would be affirmed. The request was not granted.

[1] The question, then, is whether or not the appellate court had the power under the circumstances of this case to direct a retrial of the issues as to all the defendants. In considering this question of jurisdiction it should be stated that the defendants not only appeared separately by separate answers, but also filed cross-complaints setting up their respective undivided interests. The cross-complaints were ignored in the findings and judgment for the reason that the judgment adjudicating the validity of the plaintiff's title was in effect a denial of the prayer of the cross-complaint. The appealing defendants served notice of appeal upon the plaintiff and upon their codefendants. If the nonappealing codefendants were in any sense adverse parties to the appealing codefendants, it may be that the appellate court had jurisdiction over the entire judgment. [2] While it is true that the rights of the nonappealing defendants would be affected by a lawful reversal of the entire judgment, their interests were in no sense adverse to the appellants. Their rights would be in no sense affected by a reversal of the judgment as to the appealing defendants. (Code Civ. Proc., sec. 940; *Johnson v. Phenix Ins. Co.*, 146 Cal. 571, [80 Pac. 719]). The rights of the several defendants, although cotenants, were as distinct as though each owned a separate and distinct piece of property within the limits of the certificate upon which the plaintiff based his right of recovery. The judgment having declared that the several defendants were without right or title in or to the particular property claimed by them, they could not be injuriously affected by any judgment rendered on an appeal, where the only remedy sought by the appealing defendants was a reversal of the judgment. The only difficulty in the case here is that the defendants who are now seeking a retrial of the issues as to them are seeking to reap where they have not sown.

[3] So far as the retrial of the case is concerned there is no reason why that trial cannot be had with relation to the undivided interest claimed by the appealing defendants without in anywise affecting the rights of the plaintiff and nonappealing defendants as determined by the previous judgment. [4] The broad expression "the judgment is reversed" will be confined to the issues arising upon the appeal and the parties appealing. (*Whalen v. Smith*, 163 Cal. 360, [Ann. Cas. 1913E, 1319, 125 Pac. 904].) [5] An appeal

from a judgment by some of the defendants, although the notice of appeal is general in its terms, is of necessity an appeal from only that portion of the judgment which injuriously affects the appealing defendants, and is thus, in effect, an appeal from a portion of the judgment, that is to say, the portion of the judgment adverse to their interests, unless the reversal or modification of the whole judgment is essential to protect the interests of the appealing defendants. [6] It is well settled that upon an appeal from a portion of the judgment only the appellate court has no jurisdiction to review any part of the judgment except the part to which the appeal is directed and that an order of reversal, although general in terms, will be construed to apply only to the part brought up for review. (*G. Ganahl Lumber Co. v. Weinsveig*, 168 Cal. 664, [143 Pac. 1025].) It is true that in the case just cited there were a number of consolidated mechanics' liens, so that, although there was only one judgment, there were a number of separate cases consolidated and that the case is, therefore, readily distinguishable from the one at bar. But, in principle, as has been stated, an appeal by only a portion of the defendants, however broad in terms the notice of appeal may be, is, in legal effect, an appeal only from a portion of the judgment affecting them and gives jurisdiction to the appellate court to reverse or modify the judgment only in so far as it affects the interests of the appellants. The effect of a reversal of the judgment where only a portion of the defendants appeal is discussed in the following cases and the conclusions therein arrived at conform to the views we have here expressed: *Title & Trust Co. v. California Development Co.*, 164 Cal. 58, [127 Pac. 502]; *Mercantile Trust Co. v. Superior Court*, 178 Cal. 512, [174 Pac. 51].

It is ordered that a writ of prohibition be granted as prayed for.

Angellotti, C. J., Shaw, J., Sloane, J., Lennon, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Shaw, J., who was absent.



[S. F. No. 9782. In Bank.—September 19, 1921.]

T. L. BRECHEEN, Petitioner, v. RAY L. RILEY, Real Estate Commissioner, etc., et al., Respondents.

- [1] **WRIT OF REVIEW—WHEN LIES.**—To grant a writ of review it must appear that an inferior tribunal, board, or officer, exercising judicial functions, has exceeded its or his jurisdiction, that there is no appeal from the judgment sought to be reviewed, nor, in the judgment of the court to which the application for the writ is made, any plain, speedy, and adequate remedy; and the review upon such writ cannot be extended further than to determine whether the inferior tribunal, board, or officer had regularly pursued his or its authority.
- [2] **PERSONAL RIGHTS—PURSUIT OF BUSINESS.**—It is the right of every person to pursue any lawful business or vocation he may select, subject to such legal restrictions and regulations as the proper governmental authority may impose for the protection and safety of society, and such right is available and must be protected and secured, and cannot be taken from those who possess it, without "due process of law."
- [3] **REAL ESTATE ACT—VALIDITY OF.**—The act known as the "Real Estate Act" (Stats. 1919, p. 1252) violates none of the fundamental principles of law, but is in harmony with them, in that it is a measure looking to the protection of the public, and provides a method of procedure in all respects ample to the protection of the rights of the licensee, and must be followed in order that the license can be legally revoked by the commissioner.
- [4] **ID.—ACTION OF REAL ESTATE COMMISSIONER—QUASI-JUDICIAL CAPACITY.**—The commissioner under the "Real Estate Act" acts in a *quasi*-judicial capacity when passing upon applications for a license, and when hearing petitions to revoke, and revoking, a license issued under the act, for he is deciding property rights and determining what shall be decreed in the matters before him, all of which is the exercise of a "judicial function"; but such commissions are not courts in the strict sense nor exercising judicial power as meant by the constitution conferring power upon courts, and statutes creating such commissions are constitutional.
- [5] **ID.—CHARGE OF DISHONEST DEALING—JURISDICTION.**—A charge against a person laid before the real estate commissioner of acts "involving embezzlement, false representations, and gross moral

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1. Nature and scope of bill of review, note, 20 Am. Dec. 160.

Who is entitled to file bill of review, note, Ann. Cas. 1914C, 126.



turpitude" constitute "dishonest dealing," within the meaning of the phrase used in the Real Estate Act, and presents an issue which the commissioner is clearly authorized to hear and has jurisdiction to determine.

[6] **ID.—CONSTITUTIONALITY OF ACT.**—The "Real Estate Act" (Stats. 1919, p. 1252) is constitutional.

**APPLICATION for Writ of Review. Writ denied.**

The facts are stated in the opinion of the court.

A. A. Montagne for Petitioner.

U. S. Webb, Attorney-General, Robert W. Harrison, Chief Deputy Attorney-General, and R. L. Chamberlain for Respondent.

**SHURTLEFF, J.**—This is an application for the issuance of a writ of review. The petition alleges that at all the times in it mentioned petitioner was a licensed real estate broker, doing business in the county of Alameda, this state; that he was duly served with a complaint filed in a proceeding before the real estate commissioner of the state of California asking the revocation of his license theretofore issued to him as such broker pursuant to the provisions of an act commonly known as the "Real Estate Act" (Stats. 1919, p. 1252); that petitioner answered such complaint denying in effect the allegations thereof; that a hearing was had before the commissioner, at which the petitioner was represented by his attorneys; that, preliminary to such hearing, petitioner objected to proceeding with the same on the ground "that the main question involved . . . was the determination of a judicial fact as to whether or not . . . petitioner was guilty of the commission of acts involving embezzlement, false representations and gross moral turpitude," which the commissioner had no right to determine because not legally vested with judicial powers, which objection the commissioner overruled, and proceeded with the hearing; that thereafter petitioner was served with a copy of the findings and conclusions of the commissioner, pursuant to which he revoked petitioner's "license and right to act as agent, broker and representative in the sale or exchange of real property, thus depriving him of a means of livelihood"; that thereafter petitioner, as the act gives him

the right to do, appealed from the determination of the commissioner to the superior court of the county of Alameda; that petitioner was not accorded a hearing by said last-mentioned court, but said court "merely reviewed the transcript of the evidence before the Commissioner and sustained the latter's findings." The petition also contains specific allegations touching the illegal deprivation of property and property rights of petitioner, and concludes with the following: "That the Commissioner is not a judicial officer nor clothed with judicial powers; that he has no power as a branch of our Judiciary under the Constitution of the State of California or of the United States. That he has no power to deprive Your Petitioner of a property right or to impose any penalty or forfeiture upon Your Petitioner without due process of law . . . That Your Petitioner has no speedy and adequate remedy at law."

To this petition respondents demur, alleging that it "does not state facts sufficient to constitute a cause of action or to entitle said petitioner to the relief prayed for in said petition," and it is the disposition of this demurrer that is before the court.

It is conceded there is no appeal from said order of the superior court.

The act provides that "it shall be unlawful for any person . . . to engage in the business, or act in the capacity of a real estate broker, or a real estate salesman within this state without first obtaining a license therefor"; for the creation of a "state real estate department," the chief officer of which department shall be the "real estate commissioner"; that applications for a license as real estate broker shall be made in writing to the commissioner, who may grant the same; that he "may, upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any person . . . engaged in the business or acting in the capacity of a real estate broker, or a real estate salesman, within this state," and shall have the power to temporarily suspend or permanently revoke licenses issued under its provisions, at any time and in cases where the holder thereof, in performing, or attempting to perform, any of the things mentioned in section 2 of the act, of which acting as a real estate broker is one, is guilty of any act "which constitutes dishonest dealing"; that, before suspending or revoking the license, the commissioner "shall notify,

in writing, the holder of such license of the charges against him and afford an opportunity to be heard . . . in reference thereto"; that the decision of the commissioner shall be subject to review in accordance with specified provisions of the Code of Civil Procedure. The act further provides for an appeal from the decision of the commissioner to the superior court of the county in which the person affected by the decision resides, or has his place of business, and indicates the procedure to be followed in perfecting such appeal, and that upon the hearing thereof the court shall receive and consider any pertinent evidence, oral or documentary, concerning the action of the commissioner, but is "limited to a consideration and determination of the question whether there has been an abuse of discretion on the part of the commissioner in making such decision." (Stats. 1919, p. 1252.)

[1] The code declares that to grant a writ of review, it must appear that an inferior tribunal, board, or officer, exercising judicial functions, has exceeded its or his jurisdiction; that there is no appeal from the judgment sought to be reviewed, nor, in the judgment of the court to which the application for the writ is made, any plain, speedy, and adequate remedy (Code Civ. Proc., sec. 1068), and that the review upon such writ cannot be extended further than to determine whether the inferior tribunal, board or officer had regularly pursued its or his authority. (Code Civ. Proc., sec. 1074.)

Petitioner confines his attack upon the act to the single point that the portion thereof conferring upon the commissioner authority to hear and determine proceedings to revoke a license issued pursuant to its terms is in violation of our state constitution, which declares that "the judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district courts of appeal, superior courts and such inferior courts as the legislature may establish in any incorporated city or town, township, county, or city and county." (Art. VI, sec. 1.)

[2] It is firmly established that it is the right of every person to pursue any lawful business or vocation he may select, subject to such legal restrictions and regulations as the proper governmental authority may impose for the protection and safety of society, and that such right is valuable and must be protected and secured, and cannot be taken from

those who possess it, without "due process of law." (*Hewitt v. Board of Medical Examiners*, 148 Cal. 592, [113 Am. St. Rep. 315, 7 Ann. Cas. 750, 3 L. R. A. (N. S.) 896, 84 Pac. 40]; *Suckow v. Alderson*, 182 Cal. 247, [187 Pac. 965].)

[3] The act in question violates none of these fundamental principles, but is in harmony with them, in that it is a measure looking to the protection of the public, and provides a method of procedure in all respects ample to protect the rights of the licensee, which was followed in the instant case, and must be followed in order that the license can be legally revoked by the commissioner.

[4] It is apparent that the commissioner is acting in a quasi-judicial capacity when passing upon applications for a license, and when hearing petitions to revoke, and revoking, a license issued under the act, for he is deciding property rights and determining what shall be decreed in the matters before him, all of which is the exercise of a "judicial function," but, as said by this court in *Suckow v. Alderson*, 182 Cal. 247, 250, [187 Pac. 965, 966]: "It is now well established in this state that tribunals such as the board of medical examiners or other boards empowered to revoke licenses which they have previously granted, for cause defined by the law, are not courts in the strict sense; they are not exercising 'the judicial power of the state' as that phrase is used in the constitution conferring judicial power upon courts, and that statutes creating such boards and conferring upon them such powers are constitutional." To the same effect is the following, taken from *Ex parte Whitley*, 144 Cal. 167, 179, [1 Ann. Cas. 13, 77 Pac. 879, 884]: "It is not at all uncommon for inferior boards or officers to be invested with power which calls for the determination of facts and the exercise of discretion in the discharge of the duties of their office. This power, it is true, is in a sense judicial, but it cannot be said that it is an exercise of 'judicial power' as that term is used in the constitution in conferring judicial power upon courts. The question is, however, not an open one in this state, and seems to have been settled adversely to petitioner's contention in *County of Los Angeles v. Spencer*, 126 Cal. 670, [77 Am. St. Rep. 217, 59 Pac. 202]."

[5] As we have stated, the petition herein recites that the "main" question involved in the proceeding before the commissioner "was the determination . . . as to whether or

not . . . petitioner was guilty of the commission of acts involving embezzlement, false representations and gross moral turpitude," which charges, if true, and in the absence from the record filed here of a copy of the findings of the commissioner we must assume they were found to be true, certainly constituted "dishonest dealing" within the meaning of the phrase used in the act, and presented an issue which the commissioner was clearly authorized to hear, and hence had jurisdiction to determine.

[6] For the foregoing reasons we conclude that the act in question is constitutional; that the commissioner did not exceed his jurisdiction, and in all respects "regularly pursued his authority," and, having so determined, it is not necessary to consider the contention of respondents that petitioner has a plain, speedy and adequate remedy.

The demurrer is sustained, and the application for the issuance of a writ of review denied.

Wilbur, J., Angellotti, C. J., Shaw, J., Lawlor, J., Lennon, J., and Sloane, J., concurred.

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[L. A. No. 6541. In Bank.—September 21, 1921.]

LOS ANGELES & ARIZONA LAND COMPANY (a Corporation), Respondent, v. WINIFRED F. MARR, Appellant.

[1] BUILDING RESTRICTIONS — CONDITION SUBSEQUENT — BREACH — DEFEAT OF TITLE.—Where a contract of sale of land and a deed executed in pursuance thereof both contained the "express condition," that "no residence, hotel, church or schoolhouse shall be erected or maintained on the property last above described of a less value than" a certain sum, and provided, further, that "in the event of a violation of any of these conditions or reservations this instrument shall become null and void, the grantee herein shall forfeit all right or title to said property and all interest therein shall revert without notice to the grantor herein," and that the stipulations should apply to and bind the heirs, executors, administrators, and assigns of the respective parties, the restriction clause must be construed as a condition subsequent, a breach of which may defeat the purchaser's title.

- [2] **ID.—RIGHT TO RECONVEYANCE—CONTINGENT ESTATE—TRANSFERABILITY OF.**—A right to the reconveyance of property upon breach of a condition subsequent, such as reserved in the contract and deed in question, is a contingent estate which may be transferred.
- [3] **FINDINGS—SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE—ABSENCE OF.**—In the absence of a specification of insufficiency of evidence to sustain a finding, it must be construed as binding and as warranted by the evidence adduced at the trial.
- [4] **CORPORATIONS—FORFEITURE OF FRANCHISE—CONVEYANCES—FINDINGS.**—In an action to forfeit title to land for breach of building restrictions, where the court found that a corporation predecessor in interest in the right had conveyed the right to sue for forfeiture and also found that this corporation had forfeited its franchise for failure to pay the license tax, the date not being found, however, and that the trustees of the corporation conveyed the right to plaintiff, there is a necessary implication that the conveyance by the corporation was executed before it forfeited its charter, for, where a corporation has failed to pay its license tax and a forfeiture of the charter has been declared, it thereupon ceases to be a corporation, and has no right to dispose of its property.
- [5] **FINDINGS—VARIANCE—LACK OF SUPPORT OF JUDGMENT.**—Where the findings of material facts are at variance and irreconcilable, there is no showing that the facts found warrant or support the judgment rendered, and a reversal of the judgment is necessary.
- [6] **BUILDING RESTRICTIONS.**—While conditions in a contract of sale of, and deed to, land, prohibiting the erection of a building thereon of less than a certain value and providing that in the event of a violation of the conditions or reservations there shall be a forfeiture of all right or title to the property and all interests shall revert to the grantor, are valid, they can be enforced only at the instance of one who has not waived his right to maintain such an action.
- [7] **ID.—WAIVER OF RIGHT—DEFENSE.**—Waiver of the right to enforce such a building restriction is recognized as a valid defense to an action to enforce a forfeiture for breach of the condition.
- [8] **ID.—ERECTION OF PROHIBITED BUILDING—WAIVER OF BREACH.**—In an action to declare a forfeiture of title to land for breach of a building restriction where the uncontradicted evidence showed that the building remained on the lot without objection for nearly three years and that about a year after the building was erected the seller accepted payment of the purchase price and delivered a deed of the property to the purchaser, with knowledge of the existence of the building and without complaint concerning the same, the evidence clearly established a waiver of the grantor's right to enforce a forfeiture.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge. Reversed.

The facts are stated in the opinion of the court.

Winifred F. Marr, *in pro. per.*, for Appellant.

Goodrich & Martinson for Respondent.

LENNON, J.—Defendant appeals from a judgment in favor of plaintiff in an action to enforce a forfeiture of title to real property in the county of Los Angeles.

On July 11, 1910, the Verdugo Canyon Land Company entered into a contract with the defendant, Winifred Marr, for the sale to the latter of a vacant lot which was situated in a tract owned by the said company designated as "Tract No. 250." Defendant at that time entered into possession of the land and, on August 4, 1910, erected on the property a small cottage, which she still maintains thereon. Upon completing payment of the purchase price, on July 29, 1911, defendant received a deed to the property from the said Verdugo Canyon Land Company. Both the deed and the contract of sale in pursuance of which the deed was executed contained the "express condition" that "no residence, hotel, church, or schoolhouse shall be erected or maintained upon the property last above described of a less value than \$2,000.00," providing, further, that, "In the event of a violation of any of these conditions or reservations, this instrument shall become null and void, the grantee herein shall forfeit all right or title to said property and all interest therein shall revert without notice to the grantor herein.

"And it is further understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties."

Plaintiff, Los Angeles & Arizona Land Company, claims, and the trial court found, that plaintiff became and now is the owner of the right to sue for and enforce forfeitures against those who purchased property in tract No. 250 from said Verdugo Canyon Land Company in the event that they violate the conditions of their respective deeds. The trial court also found that plaintiff became and now is the owner of various lots in the vicinity of defendant's lot and has sold and conveyed to various other purchasers divers



and sundry other lots in said vicinity; that the restriction above quoted was imposed for the purpose of enhancing the value of those lots in the vicinity of defendant's lot which were owned by the Verdugo Canyon Land Company at the time of the deed to defendant; that the cost and value of the house on defendant's lot does not exceed the sum of \$225, and that the said building is a detriment to the surrounding property. Apparently no complaint was made on account of the maintenance of the cottage on defendant's lot until the month of April, 1913, when plaintiff informed defendant of its intention to enforce the condition as to the value of buildings maintained upon the property and requested her to remove the cottage from the lot or to move it in the rear in the position of an outhouse. Defendant having refused to comply with the notice, plaintiff instituted the present action wherein it sought and obtained a decree that all defendant's right, title, and interest in and to the land in question was forfeited to plaintiff and that the deed to defendant was set aside and canceled. From this decree defendant appeals.

[1] At the outset it must be conceded that the uncompromising language of the deed to defendant requires that the building restriction clause above quoted be construed as a condition subsequent, the breach of which may defeat defendant's title. (*Firth v. Marovich*, 160 Cal. 257, [Ann. Cas. 1912D, 1190, 116 Pac. 729]; *Werner v. Graham*, 181 Cal. 174, 179, [183 Pac. 945].) Whether the said restriction amounts also to a covenant and, if so, whether such covenant can be enforced by plaintiff or other owners of property in the vicinity of defendant's lot is immaterial for the purposes of the present suit, for plaintiff is not attempting to enforce a covenant for the benefit of neighboring lands. Upon the happening of a subsequent contingency, namely, the violation of the building restriction clause, defendant's interest in the land was to revert to the grantor, his heirs, successors or assigns; plaintiff takes the position that the subsequent contingency has occurred and, as assignee of defendant's grantor, brings the present suit for forfeiture.

[2] It is settled in this state that a right to the reconveyance of property upon breach of a condition subsequent, such as that reserved to defendant's grantor, is a contingent estate which may be transferred. (*Johnston v. City of Los Angeles*, 176 Cal. 479, [168 Pac. 1047].) However, an ac-



tual transfer of the reversion or right of re-entry by succession, will or assignment is essential, and, in order to successfully sue for and enforce a reconveyance of the property in the instant case, it is incumbent upon plaintiff to prove the allegation of the complaint, denied in the answer, to the effect that the right of re-entry reserved to the defendant's grantor has passed to plaintiff by assignment. (*Werner v. Graham, supra; Hannah v. Southern Pac. R. R. Co.* (Cal. App.), 192 Pac. 304.) Upon this phase of the case the trial court found that "on or about December 8, 1911, the said Verdugo Canyon Land Company [defendant's grantor] sold and conveyed all its right, title, and interest in and to said tract 250 to the Fruit World Publishing Company, a corporation, together with its rights to enforce forfeiture for violation of the terms and conditions in said contracts and deeds made with its purchasers and that on or about July 29, 1912, the said Fruit World Publishing Company sold and conveyed all of its right, title, and interest in and to said tract No. 250 to the Verdugo Park Land and Water Company, a corporation, with like rights to enforce forfeiture." This finding, in strict accordance with the allegations of the complaint, is not specified in the bill of exceptions as unsupported by the evidence, nor attacked in any manner on this appeal. [3] In the absence of a specification of insufficiency of evidence to sustain the finding, it must be considered as binding and as warranted by the evidence adduced at the trial. (*Estate of Heaton*, 135 Cal. 385, 388, [67 Pac. 321]; *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, [194 Pac. 1024]; *Robben v. Benson*, 43 Cal. App. 204, [185 Pac. 200].) The court then finds that "said last-named corporation [Verdugo Park Land and Water Company] sold and conveyed all of its right, title, and interest in and to said tract No. 250 to plaintiff, *with like rights to enforce forfeitures.*" (Italics ours.) This finding is assailed in the bill of exceptions as unsupported by the evidence. The deed of said tract 250 from the Verdugo Park Land and Water Company to the plaintiff, which is the only evidence in the record on this question, expressly excepts defendant's lot, together with other lots in the tract which had previously been sold to individuals, from the operation of the deed and makes no mention whatever of rights reserved under previous sales of these lots or rights

to enforce forfeitures of such lots. There is, therefore, no evidence to support the finding that these rights were conveyed to plaintiff by the Verdugo Park Land and Water Company and, so far as appears from the record before us, the rights in question are still retained by the latter company. Necessarily it must be held that the finding to the effect that the Verdugo Park Land and Water Company transferred to plaintiff its right to sue for forfeiture of defendant's lot is wholly without support in the evidence.

But the plaintiff contends that, notwithstanding the insufficiency of the evidence to support this particular finding, nevertheless the trial court has made other findings of fact from which can be deduced the ultimate finding that plaintiff is the owner of the right to sue for and enforce a forfeiture against defendant. However, the remaining findings on this issue fail to sustain a judgment in plaintiff's favor. As previously stated, the trial court found that, on December 8, 1911, the Verdugo Canyon Land Company conveyed to the Fruit World Publishing Company all of the former's interest in and to the tract in question, including the right to enforce forfeitures. There is a subsequent finding that the Verdugo Canyon Land Company forfeited its charter for nonpayment of the annual license tax and has never been rehabilitated or revived (there being no finding of the date of forfeiture), that thereupon the directors of said corporation became its trustees with full power to settle its affairs and that said trustees, by deed dated December 10, 1913, conveyed to plaintiff all the said company's right, title, and interest in and to tract 250, including lot 54 (defendant's lot), and in the sales of lots made by it to purchasers, together with its right to sue for and enforce forfeitures of said lots. The court's failure to find the date upon which the charter of the Verdugo Canyon Land Company was forfeited was evidently due to an oversight, for blank spaces are left for the insertion of the dates. [4] Although there is no express finding of the date of the forfeiture of the charter, there is a necessary implication that the conveyance of December 8, 1911, to the Fruit World Publishing Company was executed by the Verdugo Canyon Land Company before it forfeited its charter, for, where a corporation has failed to pay its license tax and a forfeiture of the charter has been declared, it thereupon ceases to be a cor-

poration, and has no right to dispose of its property. (*Newhall v. Western Zinc Mining Co.*, 164 Cal. 380, [128 Pac. 1040]; *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, [159 Pac. 158].) Consequently, any conveyance found to have been made by the Verdugo Canyon Land Company must have been executed prior to the forfeiture of its charter. This conclusion is confirmed by the fact that it appears from the certificate of the Secretary of State and Governor's proclamation, set forth in the bill of exceptions, that the charter was forfeited in November, 1912. If the Verdugo Canyon Land Company conveyed the right to enforce forfeitures of lots in tract 250, including defendant's lot, to the Fruit World Publishing Company in December, 1911, no such right remained in the former company at the time its charter was forfeited, no such right passed to its directors as trustees, and, therefore, the deed of the trustees to plaintiff in December, 1913, could not convey the aforesaid right. Obviously, the finding that the right to sue for a reconveyance of defendant's property was conveyed to plaintiff by the trustees of the Verdugo Canyon Land Company after that corporation had ceased to exist is inconsistent with the finding that the Verdugo Canyon Land Company itself conveyed the said right to the Fruit World Publishing Company, which, in turn, transferred the right to the Verdugo Park Land and Water Company. If the latter finding is true, then it would appear that the Verdugo Park Land and Water Company is now the owner of the right, in view of the insufficiency of the evidence to support the further finding that the Verdugo Park Land and Water Company conveyed the right to plaintiff. [5] The findings of material facts being thus at variance and irreconcilable, there is no showing that the facts found warrant or support the judgment rendered, and a reversal of the judgment is necessary. (*Manly v. Howlett*, 55 Cal. 94; *Learned v. Castle*, 78 Cal. 454, [18 Pac. 872, 21 Pac. 11]; *Estep v. Armstrong*, 91 Cal. 659, [27 Pac. 1091]; *Rand v. Columbian Realty Co.*, 13 Cal. App. 444, [110 Pac. 322].)

There is an additional reason for the reversal of the judgment. In her second amended answer defendant pleads that, in the month of July, 1911, the Verdugo Canyon Land Company, with knowledge of the existence of the building on defendant's lot, accepted defendant's final payment of

\$1,350 and delivered to her a deed to the lot. These acts, defendant alleges, constitute a waiver and estop the said grantor, and those claiming under it, from seeking to enforce any forfeiture of title against defendant for the maintenance of the said building upon the lot. The conceded facts fully support this contention and justify defendant's claim that the evidence is insufficient to support the finding that defendant's lot is still subject to the building restriction, in so far as the present building is concerned.

[6] While the validity of conditions of this kind is not questioned (*Los Angeles & Arizona Land Co. v. Marr*, 178 Cal. 244, [173 Pac. 83]), nevertheless, such condition may be enforced only at the instance of one who has not waived his right to maintain such an action. In the case of *Union Realty Co. v. Best*, 160 Cal. 263, 265, [116 Pac. 737, 738], it is said: "In so far as the covenant was made for the benefit of the grantor, who is alone complaining here, it might be waived, and the facts found establish a clear case of waiver. The argument of appellant that evidence of an oral understanding . . . cannot vary the terms of a written contract is not to the point. The facts pleaded in defense were not relied upon to prove that the agreement did not prohibit the construction of the building where located, but to establish a waiver of the covenant or an estoppel to rely upon it. Such waiver and estoppel may be shown by parol."

[7] Waiver of such right is recognized as a valid defense to such an action. (*Brown v. Wrightman*, 5 Cal. App. 391, 393, [90 Pac. 467]; *Quatman v. McCray*, 128 Cal. 285, [60 Pac. 855].) The court found that the Verdugo Canyon Land Company consented to the erection of a temporary building by defendant upon the understanding that it should not remain upon the land for a longer period than six months. As pointed out by defendant, this finding is totally without support in the evidence. [8] The uncontradicted evidence does show that the building remained on the lot without objection for nearly three years and that in July, 1911, about a year after the building was erected, the Verdugo Canyon Land Company accepted payment of the purchase price and delivered the deed of the property to defendant, with knowledge of the existence of the building and without complaint concerning the same. This evidence clearly establishes a waiver of the grantor's right to enforce a for-

feiture of defendant's lot because of the erection and maintenance of the building in question.

In the case of *Los Angeles & Arizona Land Co. v. Marr*, *supra*, an earlier appeal in an action involving this same matter, the court merely interpreted the language of the restrictive clauses in defendant's deed and decided that plaintiff had made a *prima facie* showing of a violation of the building restriction clause by defendant, and, therefore, that a nonsuit was improper. However, upon that appeal the court did not have before it any evidence of waiver.

The judgment is reversed.

Shurtleff, J., Lawlor, J., Wilbur, J., Angellotti, C. J., and Sloane, J., concurred.

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[L. A. No. 6228. In Bank.—September 23, 1921.]

HOLLY SUGAR CORPORATION (a Corporation), et al.,  
Appellants, v. C. LEONARDT, Respondent.

- [1] **CONTRACTS — STORAGE OF SUGAR — IMPLIED TERMS.**—Where the owner of warehouses entered into a contract with the owner of certain sugar by correspondence in which the former solicited the patronage of the latter and represented that he would be in a position to store a certain quantity of sugar, and probably more, and represented that his warehouse was a reinforced concrete, fireproof building, upon which representation a certain quantity of sugar was stored, and thereafter through further negotiations between the parties additional sugar was shipped for storage, there was, in the absence of notice to the consignor to the contrary, at least an implied agreement on the part of the warehouseman to accept the additional amount for storage under the same terms and conditions as the previous amount.
- [2] **ID.—DILIGENCE IN RECEIVING GOODS FOR STORAGE—LACK OF LIABILITY FOR DAMAGE BY FIRE.**—Where an owner of warehouses, under a contract to store certain sugar, exercises reasonable diligence in prosecuting the work of storing the sugar which is shipped to him in unexpectedly large quantities, and in the process of transferring it from cars to the warehouses places it on an unloading platform which he incloses to protect it from the

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2. Liability of bailee for loss of, or injury to, goods kept at a place other than that originally intended, note, 12 A. L. B. 1322.

elements, he is not liable for destruction of the sugar by accidental fire while so temporarily stored, it being reasonably necessary to place the sugar on the unloading platform temporarily owing to the congested condition of the warehouses and it being left there no longer than, in the exercise of reasonable care and diligence, was necessary.

APPEAL from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. Affirmed.

The facts are stated in the opinion of the court.

O'Melveny, Stevens & Millikin, George K. Ford and Goodfellow, Eells, Moore & Orrick for Appellants.

Sheldon Borden for Respondent.

SLOANE, J.—This action was brought to recover for the loss by fire of 14,526 bags of sugar which the plaintiff Holly Sugar Company had delivered to the defendant for storage in his concrete fireproof warehouse.

The sugar, in the process of transfer from the cars in which it was delivered to the storage warehouse, had been stacked for several days upon the concrete unloading platform between the warehouse and railroad track. The part of the platform where the sugar was stacked was covered by a wooden roof, and for the further protection of the sugar from the elements a temporary inclosure on the sides and ends was constructed of boards lined with tar paper. While thus temporarily stored the sugar was destroyed by the accidental burning of this platform structure.

The Aetna Insurance Company, Phoenix Insurance Company of Hartford, Orient Insurance Company, and North British & Mercantile Insurance Company had issued policies of insurance to the owner upon the sugar, and, having paid this loss, claimed the right of recovery against defendant by subrogation, and are joined as plaintiffs in the action.

Plaintiffs allege in their complaint two causes of action—one for breach of contract to store the sugar in a fireproof building, and the other for negligence in the care and handling of the sugar.

Judgment was for the defendant. Plaintiffs appeal, and rely upon the alleged breach of contract for fireproof storage for a reversal.

The findings of the trial court covering the issues involved in the appeal are in substance as follows:

That the defendant was not at any time engaged in the business of conducting a warehouse, but that he was the owner of the platform building referred to and certain contiguous warehouses, one of which, designated as No. 1, was entirely of concrete construction and practically fireproof. Another, designated as No. 3, was of concrete excepting the roof, which was of wood. That pursuant to special and several arrangements made during each of the years 1913 and 1914 between defendant and Holly Sugar Company and the American Beet Sugar Company he accepted from them for storage certain shipments of sugar. "That the shipments so accepted during the year 1913 were stored in warehouse No. 1 and of the shipments so accepted in the year 1914, the greater part thereof was stored in warehouse No. 1 and the remainder, excepting the quantity of approximately fourteen thousand bags hereinafter mentioned, was stored in warehouse No. 3, and that in the year 1914 he accepted for storage in said warehouse from the American Beet Sugar Company certain barley seed; that, with said exceptions, the defendant at no time received or solicited goods or other commodities for storage in said warehouses, or either of them, and no other person or persons actually did, at any time, store or deposit for storage with the defendant, goods or commodities to be deposited in the said warehouses, or either of them.

"That on or about August 7, 1914, the defendant and said Holly Sugar Company made an agreement whereby said Holly Sugar Company agreed to deliver unto defendant approximately twenty thousand bags of sugar out of its production during the season of 1914, and defendant agreed to store said sugar in said warehouse No. 1, storage thereon to be charged and paid at the rate of twenty cents per ton per month; that thereafter and prior to the ninth day of November, 1914, said Holly Sugar Company delivered unto defendant, in cars upon the aforesaid spur-track, approximately fifty thousand bags of sugar, which said sugar was unloaded from said cars by the defendant and stored in said warehouses Nos. 1 and 3; that the portion of said deliveries in excess of the twenty thousand bags covered by said arrangement of August 7, 1914, were tendered by Holly



Sugar Company and accepted by the defendant without the making of any supplemental or additional express arrangement applicable thereto; that on or about the first week in November, 1914, said Holly Sugar Company requested defendant to store an additional quantity of sugar estimated at from fifteen thousand to twenty-five thousand bags, to which request defendant agreed; that thereafter and between November 9 and November 25, 1914, said Holly Sugar Company delivered to defendant in railroad cars upon the aforesaid spur-track, additional sugar, amounting to not less than twenty thousand bags; that said additional sugar was delivered faster and in larger quantities than the deliveries previously made and under circumstances and conditions which required the removal of said sugar from the railroad cars with such rapidity that defendant was unable, in the exercise of ordinary care, to pile and store said sugar in said warehouses as fast as the same was removed from said railroad cars; that defendant employed as many men as could be reasonably and conveniently used in the unloading and handling of said sugar and in the course of transferring same from the said railroad cars into said warehouse No. 1, a large quantity of said sugar, to wit, upward of fourteen thousand bags thereof, was temporarily deposited and accumulated on said unloading platform; that Holly Sugar Company had no knowledge or notice prior to the happening of said fire that any of its sugar had been deposited or placed on said unloading platform, nor did it have any knowledge or notice that defendant was experiencing or had experienced any unusual inconvenience or difficulty in receiving or handling any of the sugar theretofore shipped by said Holly Sugar Company, either by reason of the rapidity or rate of said shipments, or for any reason; it is not true that defendant stored said sugar or any part thereof in or upon said platform or in any shed or platform, or that the same was negligently or carelessly placed upon said unloading platform; that on or about November 16th, 1914, on account of the approaching rainy season, defendant, for the purpose of protecting said sugar on said platform against damage from rain or storm, constructed temporary outside walls on the three sides of said unloading platform which had been theretofore uninclosed; that said temporary walls were constructed of wood and lined with tar paper for



the purpose of rendering the same water-tight and protecting said sugar on said platform against the weather until the same could be removed and piled in said warehouse No. 1; that the allegations of the complaint in this action relating to the construction, character, and purpose of the said unloading platform, which are at variance with this finding, are untrue; it is not true that defendant at all or any of the times stated in said complaint carelessly or negligently failed or neglected or failed or neglected at all to supply the necessary apparatus for the extinguishing of any fire which might attack the said platform, or the said sugar deposited thereon, as hereinbefore found; that said platform was a reasonably safe place for the temporary deposit thereof of said sugar under the circumstances and conditions hereinbefore found, and was not an unsafe place for the temporary deposit of said sugar while the same was being transferred from the railroad cars into the said warehouse as aforesaid; that in so depositing said sugar on said unloading platform the defendant was not negligent or lacking in the exercise of ordinary or reasonable care and diligence for the protection and preservation of the said sugar so deposited on said unloading platform by the defendant.

“That late in the afternoon of November 25, 1914, and while said sugar, to an amount in excess of fourteen thousand bags, was deposited on said unloading platform, and while its removal into said warehouse No. 1 was going on, the same was partly injured and damaged by fire and by water used in the extinguishment of said fire; that said fire was of unknown origin and was not due to or caused by any negligence or want of ordinary or reasonable care on the part of the defendant or to any failure on his part to exercise ordinary or reasonable care and diligence for the protection and preservation of the said sugar; that neither said warehouse No. 1 nor said warehouse No. 3 were damaged by said fire, nor were the contents of said warehouses or either thereof injured or damaged by said fire, with the exception that a small portion of the sugar theretofore deposited in said warehouse No. 1 was damaged by water used in the extinguishment of the said fire; that said last-mentioned damage was not due to or caused by any negligence on the part of the defendant, or any failure on his part to exercise

ordinary or reasonable care and diligence for the protection and preservation of the said sugar."

The only material points of controversy on this appeal are, first, whether or not the evidence establishes a contract on the part of the defendant to store all the sugar received in a fireproof warehouse; and, second, whether, if such was the contract, the temporary storing of the sugar destroyed upon the loading platform was a breach of that contract.

[1] We are satisfied that the first proposition must be answered in the affirmative. The contract for storage of the 1913 consignments of sugar was expressly entered into between the parties by correspondence in which the defendant solicited the patronage of the Sugar Company and represented that he would be in a position to store at least fifty thousand bags of sugar and probably more. One of the defendant's letters to the Sugar Company contained the following passage: "I believe you have seen my warehouse and know that it cannot be beaten for sugar storage or for any other purpose as I use only my reinforced warehouse for this purpose and it is absolutely moisture and vermin proof." In another letter he refers to it as "Warehouse No. 1, which is the reinforced concrete, fireproof building." Under these express representations the Sugar Company stored about twenty thousand bags of sugar with defendant for the season of 1913.

In the summer of 1914 negotiations were again entered into for the storage of sugar for the approaching season of 1914, in which the Sugar Company proposed to furnish for storage approximately the same quantity of sugar that had been stored the previous year, some twenty thousand bags, and on August 7th defendant's manager addressed the following letter to the Sugar Company:

"Manager Holly Sugar Company,  
"Huntington Beach, California.

"My dear Mr. Johnson:

"Since your telephone message of a few days ago to the effect that you expected to commence shipping me sugar for storage in my warehouse I have been expecting to hear further from you. I have cleaned out my warehouse No. 1 where I stored sugar last year and where I will do the same this year and have removed the lime and other objectionable material so that the place is absolutely clean in every respect,

and I will also cover your sacks with canvas. I will appreciate it very much if you will kindly advise me if you have as yet received the instructions you stated you expected from the East in reference to making shipments to me. I have everything arranged to receive your sugar and a day or two's notice while not absolutely necessary would be appreciated, especially if you are in position to inform me as to the approximate number of bags which you will ship me every day.

"I assure you I am in position to give you the same satisfactory service I know I rendered you on last year's shipments.

Very truly yours,

"C. LEONARDT,

"By MERRILL."

In September, 1914, the Sugar Company began delivering sugar for storage pursuant to the terms, expressed and implied, in the foregoing letter. There can be no question that there was at least an implied agreement to accept at least twenty thousand bags of sugar for storage under the same terms and conditions as of the previous year.

Under this arrangement the Sugar Company consigned and delivered for storage between September 1st and the early part of November not only the suggested amount of twenty thousand bags, but some twenty-five or thirty-five thousand bags in excess of this amount. All, or practically all, of this sugar was stored in warehouses Nos. 1 and 3 before the transactions relating to the consignments of sugar that were damaged by fire. Whether or not the storage of part of the sugar in warehouse No. 3 was in violation of the contract is not material on this appeal, as none of the damage complained of resulted from such storage.

These latter deliveries were made under the following circumstances: On or about the first of November the representative of the Sugar Company called up the defendant by telephone and inquired if he could take care of from fifteen to twenty-five thousand additional bags of sugar. Defendant replied that they had already shipped him approximately twice the amount agreed upon and that he could not tell positively whether he could take it or not. But on the following day the Sugar Company was notified that defendant would receive the additional shipments.

Nothing was said and no inquiry was made as to how or where this extra quantity of sugar was to be stored.

We are satisfied, however, that there was implied in this transaction, in the absence of notice to the consignor to the contrary, an agreement for the same fireproof storage covered by the former agreements.

The court has not found explicitly on this point, but as the probative facts found would only justify such an ultimate conclusion, we will treat it as so found.

The remaining question is: Was there a breach of this contract? The answer depends upon whether or not there was a failure on the part of the defendant to exercise reasonable care and diligence in transferring the sugar from the cars in which it was delivered at defendant's unloading platform, into the permanent storage warehouses.

Clearly, the defendant was entitled to a reasonable time and to the use of reasonable and ordinary methods for making such transfer. That the plaintiffs, the Sugar Company and the Insurance Companies, contemplated that there was likely to be some period in which the sugar would be exposed to possible risk upon the platform of defendant's warehouse is indicated by the fact that the policies contained the following clause of insurance: "On Sugar and containers; all while contained in the one-story concrete building known as Leonardt's Warehouse No. 1, and/or while on platforms adjoining, or in railroad cars on tracks within 300 feet thereof, . . . "

It was a question of fact for the court whether or not the defendant used due skill and diligence in the process of handling this sugar in transit from the cars to the warehouse. To repeat the findings on this point it is declared by the court "that said additional sugar was delivered faster and in larger quantities than the deliveries previously made and under circumstances and conditions which required the removal of said sugar from the railroad cars with such rapidity that defendant was unable, in the exercise of ordinary care, to pile and store said sugar in said warehouses as fast as the same was removed from said railroad cars; that defendant employed as many men as could be reasonably and conveniently used in the unloading and handling of said sugar, and in the course of transferring same from the said railroad cars into said warehouse No. 1. . . . That said

platform was a reasonably safe place for the temporary deposit thereon of said sugar under the circumstances and conditions hereinbefore found, and was not an unsafe place for the temporary deposit of said sugar while the same was being transferred from the railroad cars into the said warehouse as aforesaid; that in depositing said sugar on said unloading platform the defendant was not negligent or lacking in the exercise of ordinary or reasonable care and diligence for the protection and preservation of the said sugar so deposited on said unloading platform by the defendant. . . . That said fire was of unknown origin and was not due to or caused by any negligence or want of ordinary or reasonable care on the part of the defendant, or to any failure on his part to exercise ordinary or reasonable care and diligence for the protection and preservation of the said sugar."

Here again there is a lack of an explicit finding that it was reasonably necessary to store said sugar temporarily upon the platform and that it was left there no longer than in the exercise of reasonable care and diligence was necessary. But from the general facts found there can be no doubt that such was the conclusion intended by the court.

There were several circumstances shown in evidence tending to support such an ultimate finding. The defendant without having previous notice had received twice as much sugar as had been contracted for prior to the arrangement for taking the last extra consignment of upward of twenty thousand bags. In order to make room for this last consignment he had found it necessary to restack much of the sugar already stored. The sugar was delivered in larger and more frequent consignments of carload lots than previously, and as the warehouse became filled and the surplus had to be placed at higher elevations the work of storing was necessarily retarded and hampered.

[2] Under all these circumstances we cannot say as a matter of law that there was lack of reasonable care and diligence in allowing this quantity of sugar to accumulate in the temporary quarters on the platform during the ten or fifteen days of this extra delivery. There is no significance in the fact that some of the sugar first delivered about the 9th of September was still on the platform when the fire occurred on the 25th. When practicable to do so without

subjecting the cars to demurrage charges, the sugar was unloaded directly into the warehouse. It thus resulted that sugar received the day before the fire was safely stored in the warehouse, while sugar received the early part of the month was still stacked under the platform shelter. But it can make no difference in plaintiff's loss or defendant's liability whether the fourteen thousand sacks of sugar damaged were of the first or last deliveries. The question is: Did defendant keep the sugar moving into the warehouse as rapidly as he reasonably could?

The evidence is sufficient to indicate that the defendant was exercising reasonable diligence in prosecuting the work of storing the sugar in view of the congested condition of the warehouse and the unexpected increase in the quantities delivered.

There is one circumstance, however, which is strongly urged by appellant as reflecting against defendant's care and diligence. The evidence discloses, and the court finds, that defendant sent no notice to the Sugar Company that the shipments were coming in faster than they could be taken care of or that sugar was being left upon the unloading platform. On the other hand, the Sugar Company did know that they had sent in quantities of sugar largely in excess of the amount originally stipulated for; that when it had asked for storage of a further lot of fifteen to twenty-five thousand sacks, the defendant had expressed uncertainty as to whether or not he had room for it, and no conditions were made as to how it was to be handled. It was perhaps incumbent upon the Sugar Company to make some inquiry and investigation as to the facilities of the defendant for speedily receiving and storing this large excess of deliveries.

If this was a matter of first impression in this court the conclusion might be different. But as against the findings of the trial court we are not justified in reversing its judgment.

Judgment affirmed.

Shaw, J., Wilbur, J., Shurtleff, J., Lennon, J., Lawlor, J., and Angellotti, C. J., concurred.

Rehearing denied.

All the Justices concurred, except Shaw, J., who was absent.

[L. A. No. 6533. In Bank.—September 27, 1921.]

**RACHEL A. McEWEN, Appellant, v. NEW YORK LIFE INSURANCE COMPANY (a Corporation), Respondent.**

- [1] **LIFE INSURANCE—MEDICAL EXAMINATION—ACCIDENTS.**—In a medical examination on an application for life insurance, a question as to what illnesses, diseases, or accidents the applicant has had since childhood calls for facts in regard to accidents suffered since childhood, as well as illnesses and diseases, and an answer which omits all mention of accidents is, in effect, an answer that no accidents have been sustained.
- [2] **LAW OF THE CASE—MEANING OF.**—The doctrine of the law of the case means simply that the court having once decided the law and the cause having gone back to the lower court for further proceedings in accordance with the law as thus established, and the parties and the lower court having acted in reliance upon that law, the appellate court will not, upon a second appeal, again enter into a consideration of the question, but, if the facts and circumstances are substantially the same, will treat it as settled law, regardless of its accuracy.
- [3] **LIFE INSURANCE—FALSE ANSWERS—DIRECTING VERDICT.**—In an action on a life insurance policy where the evidence conclusively shows that the answer to a question concerning "illnesses, diseases, and accidents" was untrue and, according to the law laid down for the guidance of the trial court, the truth or falsity of the answers was the determining factor and the only question to be submitted to the jury, it was proper for the judge to direct a verdict for defendant upon the theory that a material question had been falsely answered by the decedent.
- [4] **ID.—ACCIDENT—INFORMING MEDICAL ADVISER—INCOMPETENT EVIDENCE.**—In an action on a life insurance policy, where it is contended in defense that the insured falsely answered a question on his medical examination in failing to report an accident, there is no competent evidence in support of plaintiff's contention that the decedent informed the medical examiner of the accident, where the only evidence tendered was that of the physician, who testified that he had no independent recollection whatever of the examination and a memorandum signed by the witness by which it was sought to refresh his memory dated nine years after the examination was not shown to have been written or dictated by the witness or to have been written at a time when it was fresh in the witness' memory or that he knew the fact was correctly stated therein.



- [5] **ID.—WITNESSES—REFRESHING MEMORY—MEMORANDUM.**—A witness cannot refresh his memory or testify from a memorandum unless it is made to appear that the memorandum complies with certain qualifications specified in section 2047 of the Code of Civil Procedure.
- [6] **ID.—EVIDENCE—FAILURE TO CALL WITNESS—PRESUMPTION.**—In such an action the contention of plaintiff that since defendant objected to plaintiff's questioning the physician who examined the decedent for defendant and itself failed to call the physician, the presumption arises that the physician's testimony would have been adverse to defendant, cannot be maintained, as defendant was under no obligation to call the physician as its own witness or to permit him to testify for plaintiff, especially as the physician was unable to recall the medical examination at all and there was no legally competent memorandum to aid him.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Chas. Monroe, Judge. Affirmed.

The facts are stated in the opinion of the court.

Murphey & Poplin for Appellant.

Meserve & Meserve and Paul H. McPherrin for Respondent.

**LENNON, J.**—This action was instituted for the recovery of the amount of a life insurance policy issued by the defendant, New York Life Insurance Company, in July, 1910, to plaintiff's son, Charles B. McEwen, who died in November, 1910. Defendant resists payment of the policy upon the ground that the decedent procured the issuance of the policy by means of fraud, concealment, and misrepresentations in answering written questions propounded to him by defendant's medical examiner on June 29, 1910, and that defendant accepted the application and issued the policy in reliance upon the truth of these answers. The present litigation has been pending for over nine years and this is the third appeal which has been taken. The first trial resulted in a verdict in favor of plaintiff, but judgment thereon was reversed by the district court of appeal upon the ground that the trial judge had submitted to the jury the issue of the materiality of the questions claimed to have been falsely answered (*McEwen v. New York Life Ins. Co.*, 23 Cal. App. 694, [139 Pac. 242]); likewise a judgment entered upon a



verdict rendered in plaintiff's favor upon the second trial was reversed by the district court of appeal. (*McEwen v. New York Life Ins. Co.*, 42 Cal. App. 133, [183 Pac. 373].) On the third trial the judge directed a verdict for the defendant, and plaintiff appeals, claiming that a directed verdict was unwarranted by the facts of the case.

The only answer of decedent in the medical examination which is of importance for the purposes of this appeal is the following: "What illnesses, diseases, or accidents have you had since childhood? (The Examiner should satisfy himself that the applicant gives Full and Careful Answers to this question.) Name of Disease, Typhoid pneumonia. Number of Attacks, One. Date, 1891. Duration. Severity, Severe. Results, Complete recovery." The above-quoted question was asked for the purpose of ascertaining information concerning the condition of decedent's health in certain particulars deemed deserving of especial consideration in connection with the issuance of a life insurance policy. The question is neither ambiguous nor misleading. [1] It calls for facts in regard to *accidents* suffered since childhood, as well as illnesses and diseases, and an answer which omits all mention of accidents is, in effect, an answer that no accidents have been sustained. (*Malicki v. Chicago Guar. Fund Life Soc.*, 119 Mich. 151, [77 N. W. 690].) At the close of the written questions and answers the insured certified "that I have carefully read each and all of the above answers, that they are each written as made by me that each of them is full, complete and true." It was proven by the defendant company, and is conceded by plaintiff, that in July, 1909, just a year prior to the application for the policy, the decedent Charles B. McEwen was injured by being struck or kicked in the chest by the foot of a mule, as a result of which his chest was injured, his back strained and one rib broken; owing to temporary total disability caused by the injury he received from an accident insurance company the sum of \$25 per week for a period of sixteen weeks, amounting in all to four hundred dollars. The injury received for the time being rendered him unfit for any business whatsoever and seriously impaired his health. Notwithstanding the serious consequences ensuing from the accident sustained by decedent in July, 1909, which disabled him for a period of nearly four months, he failed to set

forth the accident in his answers to the questions asked by the defendant company in an examination held on June 29, 1910. Inasmuch as decedent made no mention of accidents in answer to a question calling for disclosures of accidents, and since, on the third trial, it was conceded that decedent had sustained the above-described accident less than a year before answering the said question, the conclusion is inescapable that the question was falsely answered.

Upon the second appeal of this case the district court of appeal held that it was error for the trial judge to submit to the jury the question whether or not the accident tended to effect the longevity of the decedent; that the only question to be passed upon by the jury was the truth or falsity of decedent's answers, and that a determination of this point would settle the rights of the parties. [2] This statement of the law by the district court of appeal became the law of the case and was binding upon the trial court upon the third trial. "The doctrine [of the law of the case] means simply this: That the court having once decided the law, and the cause having gone back to the lower court for further proceedings in accordance with the law as thus established, and the parties and the lower court having acted in reliance upon that law, this court will not, upon a second appeal, again enter into a consideration of the question, but, if the facts and circumstances are substantially the same, will treat it as settled law, regardless of its accuracy." (*Brett v. S. H. Frank & Co.*, 162 Cal. 735, 739, [124 Pac. 437, 439].)

[3] Since the evidence conclusively shows the answer to the question concerning "illnesses, diseases, and accidents" was untrue and, according to the law laid down for the guidance of the trial court, the truth or falsity of the answers was the determining factor and the only question to be submitted to the jury, it was proper for the judge to direct a verdict for defendant upon the theory that a material question had been falsely answered by decedent. (*Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, [75 Pac. 787]; *Estate of Baldwin*, 162 Cal. 471, [123 Pac. 267].)

It is claimed that, on the third and last trial, the court erroneously sustained objections to certain evidence offered by plaintiff. This evidence, plaintiff contends, tended to show that decedent informed defendant's medical examiner of the said accident, and that the examiner thought the acci-

dent unimportant and for that reason did not include it in the written answer. We may assume, without deciding, that, had that been shown to be the fact, the company, and not decedent, would have been responsible for the failure to mention the accident in the written answers to the medical examination and, therefore, that it would have been error to exclude competent evidence on this point. [4] We are of the opinion that no competent evidence in support of this contention was proffered by the plaintiff. The only evidence sought to be introduced on this point was the testimony of the physician who examined decedent on June 29, 1910. The physician testified that he had no independent recollection whatever of his examination of the decedent. It appears that the witness was seriously ill in September, 1919, and that the trial at which he testified took place in November, 1919. [5] Plaintiff's attorney sought to have the witness refresh his memory from, or testify from, a written memorandum. Defendant's counsel objected to the witness testifying from this memorandum, and the court sustained the objection. Section 2047 of the Code of Civil Procedure provides that a witness may refresh his memory respecting a fact from a written memorandum or "may testify from such a writing, though he retain no recollection of the particular facts." A witness cannot, however, refresh his memory or testify from such a memorandum unless it is made to appear that the memorandum complies with certain qualifications specified in said section 2047 of the Code of Civil Procedure. In the present case the only fact disclosed in connection with the memorandum, aside from the fact that it was dated July 19, 1919, nine years after the medical examination, is the fact that it was signed by the witness; there was no showing that the witness wrote or dictated the memorandum, or that it was written at a time when the fact was fresh in his memory, or that he knew the fact was correctly stated therein. It would, therefore, have been improper for the court to have permitted the witness to testify from the memorandum in question. (*Morris v. Lachman*, 68 Cal. 109, 112, [8 Pac. 799]; *Stone v. San Francisco Brick Co.*, 13 Cal. App. 203, [109 Pac. 103].) Furthermore, the memorandum itself, which is set forth in the bill of exceptions, furnishes evidence of its own unre-

liability. It purports to have been made nine years after the happening of the event, and states that the physician examined decedent in 1908, and found no evidence of injury from the accident, whereas the examination with which the parties are concerned in the instant case is one held in 1910, and the accident occurred in 1909.

[6] Counsel for plaintiff further contends that, since defendant objected to plaintiff's counsel questioning the physician who examined decedent for the defendant and itself failed to call the physician, the presumption arises that the physician's testimony would have been adverse to defendant. (Code Civ. Proc., sec. 1963, subds. 5 and 6.) However, defendant was under no obligation to call the physician as its own witness or to permit him to testify for plaintiff, particularly in view of the fact that the physician was unable to recall the medical examination at all, and it does not appear that there was any legally competent memorandum which he might use to aid him in testifying.

Defendant, by its answer, alleged the cancellation of the policy and deposited in court \$347.10, the amount of premium paid on the policy. It is claimed that plaintiff is entitled to this sum and that she was deprived of it by the directed general verdict in favor of defendant. We are entirely satisfied that such is not the effect of the verdict or judgment given. The request of the defendant for an instruction directing a verdict in favor of defendant was based on its claim that the policy was voidable on the ground of fraud on the part of the insured in obtaining the policy, and that, therefore, the defendant had a right to rescind. This was the position of the trial court in directing a verdict for the defendant, and this result carried with it necessarily the implication that the money paid into court should be restored to the party entitled thereto. There was uncontradicted evidence sufficient to support a finding of a gift of the policy by the insured to the plaintiff, and the directed general verdict in favor of the defendant necessarily implied that the plaintiff was entitled to the premium money paid into court by the defendant for the purpose of effecting a rescission. The judgment given in this case upon the directed verdict does not preclude the plaintiff from recover-

ing this money. Neither does our affirmance of such judgment have any such effect.

The judgment is affirmed.

Lawlor, J., Sloane, J., Wilbur, J., and Angellotti, C. J., concurred.

Rehearing denied.

All the Justices concurred, except Shaw, J., who was absent.

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[L. A. No. 6784. In Bank.—September 30, 1921.]

In the Matter of the Estate of BENJAMIN M. FREES,  
Deceased.

- [1] **COMMUNITY PROPERTY—SECTION 164 OF THE CIVIL CODE—STATUTORY CONSTRUCTION.**—Two rules have been uniformly adhered to in the interpretation of section 164 of the Civil Code and its amendments: First, that the law has been construed as applying only to property acquired in California, or by persons domiciled here; and second, that amendments are not to be construed as retroactive, unless the language thereof compels such a construction.
- [2] **ID.—PROPERTY ACQUIRED IN OTHER STATES—STATUS OF.**—Notwithstanding the definition of community property has in terms included all property acquired by the husband or wife after marriage, other than that acquired by gift, bequest, devise, or descent, it has uniformly been held that property acquired in other states by persons domiciled therein and subsequently brought to California by them at the time of establishing residence in this state, retained the status that it had in the state where it was acquired, regardless of our definition of community property.
- [3] **STATUTORY CONSTRUCTION—CODES AND AMENDMENTS NOT RETROACTIVE.**—The Civil Code expressly provides that no part of it is retroactive unless expressly so declared, which rule applies to the amendments to that code as well; and it is a general rule of statutory construction that statutes should not be construed retrospectively unless it is clear that such was the legislative intention.
- [4] **COMMUNITY PROPERTY—PROPERTY ACQUIRED OUTSIDE OF STATE—CONSTRUCTION OF SECTION 164 OF THE CIVIL CODE.**—The clause of section 164 of the Civil Code, as amended in 1917, referring to personal property, construed prospectively and not retrospectively,

as required by our code and by our decisions, should read that personal property wherever situated (thereafter) acquired by a person while domiciled elsewhere which would not have been the separate property of either husband or wife, if acquired while domiciled in this state, is community property; and so construed all personal property owned by a decedent at the time of his removal to California in 1910 would be his separate property according to the law in force at that time, and would be unaffected by the amended definition of community property of 1917, where the property was separate property under the law of the state in which it was acquired.

- [5] **ID.—SECTION 1402, CIVIL CODE—INHERITANCE TAX ACT OF 1917.**—Section 1402 of the Civil Code, providing for the succession to the community property of a decedent, would have no application to such separate property, and section 1 of the Inheritance Tax Act of 1917, which refers only to the community property to which the wife would succeed under section 1402 of the Civil Code, would have no application to such separate property.

**APPEAL** from a judgment of the Superior Court of San Diego County. C. N. Andrews, Judge. Reversed.

The facts are stated in the opinion of the court.

James L. Atteridge, John W. Carrigan and Karl R. Levy for Appellant.

Allen E. Rogers for Respondent.

**WILBUR, J.**—This is an appeal by the controller of the state from an order fixing inheritance taxes. The question involved is as to the exemption of the wife's interest in community property under the Inheritance Tax Act of 1917 (Stats. 1917, p. 880), in effect at the time of the death of the decedent, which occurred May 28, 1920.

The deceased left property appraised by the inheritance tax appraiser at \$1,526,858.76.

The inheritance tax appraiser in his report had fixed a tax upon the widow's interest of \$91,506.18, said amount being estimated upon \$933,301.47, appraised as follows: Bequest, \$100,000; residuary legacy, \$833,301.47. This report was objected to by the widow, Ella R. Frees, the respondent, who claimed a deduction from the appraised value of the property bequeathed to her of an amount equal to one-half the value of the entire community property, to wit, of \$677,-

706.82. The court sustained the widow's contention and made the deduction claimed from the value of the estate bequeathed to the widow (\$933,301.47), leaving a balance of \$255,594.65 upon which the tax was estimated, after allowing a \$25,000 exemption. The amount of the tax thus fixed was \$15,069.47. The appellant claims that the order fixing the tax was erroneous because of the deduction of \$677,706.83.

Ella R. Frees, the respondent, was married to Benjamin M. Frees April 10, 1867, in the state of Wisconsin. At the time of their marriage the husband had property valued at \$20,000. It was admitted by the respondent that this amount, together with five per cent interest per annum, aggregating \$53,000, was separate property. The deceased and his wife, the respondent, went to Chicago, Illinois, immediately after their marriage and remained as residents thereof until November, 1910, at which time they came to California and resided here from that time until the death of the husband. At the time the amendment of 1917 of section 164 of the Civil Code went into effect there had been accumulated as rents, issues, and profits of the property brought to California by the decedent, \$300,000, and thereafter up to the time of his death from the same sources the estate was increased \$200,000. The balance of the property, about \$1,000,000, was personal property accumulated in the state of Illinois. The decedent left a will wherein a legacy of \$100,000 was made to his wife and she was also made the residuary legatee. The latter bequest is appraised at \$833,301.47. No question is raised as to the value of the estate given to the wife or as to the proper interpretation of the will. The only question presented is as to the proper interpretation of the Inheritance Tax Act of 1917, with relation to community property, and as incidental thereto the question of the effect of the new definition of community property contained in the amendment to section 164 of the Civil Code (Stats. 1917, p. 827), which was approved May 23, 1917, and went into effect July 27, 1917, on the same days that the Inheritance Tax Act of 1917 was approved and took effect.

Section 1, subdivisions 1 and 2, of the Inheritance Tax Act of 1917 is as follows: "Section 1. (1) This act shall be known as the 'inheritance tax act.' (2) The words



'estate' and 'property' as used in this act shall be taken to mean the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor, or donor passing or transferred to individual legatees, devisees, heir, next of kin, grantees, donees, vendees, or successors, and shall include all personal property within or without the state; provided, that *for the purpose of this act the one-half of the community property which goes to the surviving wife on the death of the husband, under the provisions of section one thousand four hundred two of the Civil Code, shall not be deemed to pass to her as heir to her husband, but shall, for the purpose of this act, be deemed to go, pass, or be transferred to her for valuable and adequate consideration and her said one-half of the community shall not be subject to the provisions of this act;* provided, further, that in case of a transfer of community property from the husband to the wife, within the meaning of subdivisions (3) or (5) of section two of this act, one-half of the community property so transferred shall not be subject to the provisions of this act; and provided, further, that the presumption that property acquired by either husband or wife after marriage is community property, shall not obtain for the purpose of this act as against any claim by the state for the tax hereby imposed; but the burden of proving such property to be community property shall rest upon the person claiming the same to be community property." (Italics ours.) Section 1402 of the Civil Code referred to in the above-quoted section provides that "Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, . . . In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration." For a definition of community property we must look to section 164 of the Civil Code, above referred to. As amended in 1917, that section reads as follows: "All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and *personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of*



*either if acquired while domiciled in this state, is community property; . . .*” (Italics ours.) The property involved in this litigation is all personal property, and it is conceded that under the provisions of section 164 of the Civil Code it would be community property if that section is retroactive and constitutional. Section 172 of the Civil Code was amended and section 172a was added to the Civil Code on the same day as the amendment to section 164 of the Civil Code. Previous to the amendment, section 172 of the Civil Code gave the husband the management and control of all the community property with like power of disposition other than testamentary as he has of his separate estate, except that he could not give it away without consideration or sell the household furniture or wearing apparel without the written consent of the wife. By the amendment his absolute power was confined to personal property (Civ. Code, sec. 172; Stats. 1917, p. 829), and as to community real property, the husband was given the management and control thereof, subject to the requirement that the wife must join in any conveyance or encumbrance thereof except a lease for a year or less.

[1] Two rules have uniformly been adhered to in the interpretation of section 164 of the Civil Code and its amendments. First, that the law has been construed as applying only to property acquired in California, or by persons domiciled here. Second, that amendments are not to be construed as retroactive, unless the language thereof compels such a construction. [2] Thus, notwithstanding that the definition of community property has in terms included all property acquired by the husband or wife after marriage, other than that acquired by gift, bequest, devise, or descent, it has uniformly been held that property acquired in other states by persons domiciled therein and subsequently brought to California by them at the time of establishing residence in this state, retained the status that it had in the state where it was acquired, regardless of our definition of community property. As in most of the states, property acquired after marriage was the separate property of the husband; it remained such when brought to this state by the husband. (*Kraemer v. Kraemer*, 52 Cal. 302; *Estate of Burrows*, 136 Cal. 113, [68 Pac. 488]; *Estate of Nicolls*, 164 Cal. 368, [129 Pac. 278]; *Estate of Warner*, 167 Cal. 686, 691, [140 Pac. 583]; *Estate of Boselly*, 178 Cal. 715, [175 Pac.

4]; *Estate of Arms*, 186 Cal. 554, [199 Pac. 1053].) Under the law of the state of Illinois the personal property acquired by the decedent during his marriage and while domiciled in the state of Illinois would constitute his separate property (*Estate of Arms, supra; Kraemer v. Kraemer, supra*). It was so stipulated on the hearing of the report of the inheritance tax appraiser. Thus section 164 of the Civil Code, as originally enacted, was construed to have no extraterritorial force, but the amendment of 1917 to section 164 of the Civil Code expressly applies extraterritorially to "personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state," and the decision in this case hangs upon the proper application of this section to the facts. The Inheritance Tax Act of 1917 exempts from taxation the portion of the community property to which the wife succeeds under section 1402 of the Civil Code. The determination of that question in turn depends upon the definition of community property. We must, therefore, determine the rights of the wife as successor or heir to the community property in order to determine the proper deduction from her bequests.

The appellant advances two propositions with reference to the proper construction of these sections, first, that section 164 of the Civil Code is unconstitutional in so far as it seeks to convert the separate property of the husband or wife theretofore recognized as such by the laws of California into community property; and, second, that the statutes of 1917 should not be given a retroactive effect. In support of the first proposition, the appellant relies upon the decision in *Spreckels v. Spreckels*, 116 Cal. 339, [58 Am. St. Rep. 170, 36 L. R. A. 497, 48 Pac. 228]. If, however, the statute cannot be given any retroactive effect, we need go no further in this case, for all the property acquired in the state of Illinois by the spouses was acquired and brought into the state before section 164 of the Civil Code was amended.

[3] The Civil Code expressly provides that "No part of it is retroactive unless expressly so declared" (Civ. Code, sec. 3), and this rule applies to the amendments to the Civil Code as well. (*Sharp v. Blankenship*, 59 Cal. 288; *Central Pacific R. R. Co. v. Shackelford*, 63 Cal. 261; *Bank of Ukiah v. Moore*, 106 Cal. 673, 680, [39 Pac. 1071]; *Estate*

of *Richards*, 133 Cal. 524, 527, [65 Pac. 1034].) It is also a general rule of statutory construction that statutes should not be construed retrospectively unless it is clear that such was the legislative intention. (*Bascomb v. Davis*, 56 Cal. 152.) In *Cooley on Constitutional Limitations*, seventh edition, page 529, it is said: “. . . it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.” In *Endlich on the Interpretation of Statutes* (page 362), it is said: “. . . Indeed, the rule to be derived from the comparison of a vast number of judicial utterances upon this subject, seems to be, that, even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal and unavoidable implication from the words of the statute taken by themselves and in connection with the subject matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention.” (See, also, *Greer v. Blanchar*, 40 Cal. 194, 197; *Gates v. Salmon*, 28 Cal. 320, 321; *Pignaz v. Burnett*, 119 Cal. 157, [51 Pac. 48]; *Willcox v. Edwards*, 162 Cal. 455, [Ann. Cas. 1913C, 1392, 123 Pac. 276]; 36 Cyc. 1205.)

[4] The clause of section 164 of the Civil Code, as amended, now under consideration, construed prospectively and not retrospectively, as required by our code (Civ. Code, sec. 3) and by our decisions, should be read as follows: “personal property wherever situated (hereafter) acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property.” So construed, all of the personal property owned by the decedent at the time he removed to the state of California would be his separate property, in accordance with the laws in force at the time of the transfer (1910), and would be unaffected by the amended definition of community property. [5] Section 1402 of the Civil Code, providing for the succession to the community property of deceased, would have no application to such separate property and section 1 of the Inheritance Tax Act of 1917, which refers only to the community prop-

erty to which the wife would succeed under section 1402 of the Civil Code, would have no application to such separate property. If this is the proper construction of section 164 of the Civil Code, we are not concerned with the question of whether or not the legislature could exempt such separate property so acquired from inheritance or succession taxes or could provide that the wife should succeed to one-half thereof. Conceding such power it was not exercised in the passage of the laws in question.

From this conclusion it results not only that the million dollars or thereabouts brought to the state of California by the decedent, but also the \$200,000 rents, issues, and profits thereafter accumulated in this state before 1917, and that the \$300,000 rents, issues, and profits thereto accruing subsequent to the enactment of the amendment of 1917 to section 164 of the Civil Code, was the separate property of the decedent. Although the \$300,000 was the product of property acquired elsewhere, which property would have been community property if acquired in this state, it is not acquired in another state nor the product of such property acquired in another state after the enactment of the law of 1917, because from and after 1917, the \$1,300,000 principal was in contemplation of law within the state, and the rents, issues, and profits were therefore the separate property of the husband (Civ. Code, sec. 163).

Judgment reversed, with instructions to the trial court to fix the inheritance tax payable by the widow, upon the valuations already determined and in accordance with this opinion.

Shaw, J., Sloane, J., Shurtleff, J., Lennon, J., Lawlor, J., and Angellotti, C. J., concurred.

[L. A. No. 6527. In Bank.—September 30, 1921.]

In the Matter of the Application of D. D. McDONALD, Publisher, to have the Standing of the "Ontario Weekly Herald," etc., as a Newspaper of General Circulation, etc., Ascertained and Established.

- [1] PUBLICATION—DEFINITION OF WORD "PRINT."—The definition of the word "print" is to put in print, or cause to be put in print or issued from the press; carry or send forth in print; publish.
- [2] NEWSPAPERS—GENERAL CIRCULATION—PRINTING IN ONE TOWN AND PUBLICATION AND CIRCULATION IN ANOTHER.—The fact that the physical printing of a paper is done in one town, and the publication and circulation in another, does not prevent it from being a newspaper of general circulation within the meaning of section 4460 of the Political Code.

APPEAL from a judgment of the Superior Court of San Bernardino County. Rex B. Goodcell, Judge. Affirmed.

The facts are stated in the opinion of the court.

George D. Squires and Archie D. Mitchell for Appellant.

McNabb & Hodge for Respondent.

LAWLOR, J.—This is an appeal by the contestant from a judgment in favor of the petitioner, on a petition to have a publication declared to be a newspaper of general circulation, as that term is defined in section 4460 of the Political Code.

The petitioner, D. D. McDonald, was the editor and publisher of the "Ontario Weekly Herald." In accordance with the provisions of section 4462 of the Political Code, he petitioned the superior court of San Bernardino County to have the said publication declared a newspaper of general circulation, and entitled to print publications, notices by publication, official advertising, or public or legal notices. Section 4462 provides: "Whenever a newspaper shall desire to have its standing as a newspaper of general circulation, as that term is defined in section four thousand four hundred and sixty, ascertained and established, it may . . . file

a verified petition in the superior court of the county, or city and county, in which it is established, printed and published, setting forth the facts which justify such action. . . . ” Section 4460 of the Political Code is as follows: “A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a *bona fide* subscription list of paying subscribers, and which shall have been established, printed and published at regular intervals, in the state, county, city, city and county, or town, where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement.” The material allegations of the petition were to the effect that the “Herald” was a newspaper published for the dissemination of local and telegraphic news; that it had a *bona fide* subscription list; that it was established July 18, 1918; that it was published at Ontario, California, every Thursday for more than one year preceding the filing of the petition; and that it was not devoted to or published in the interest of any particular class or group. The petition was contested by the California Press Association, the only objection to its sufficiency being that it did not allege that the paper was “printed” at Ontario. Upon the trial, petitioner, who was the only person examined, testified that the physical printing of the paper was not done at Ontario, but at Colton, California, but that the office was at Ontario, which was the principal place of circulation, and that a city license to conduct the business of a newspaper was paid to the city of Ontario. Judgment was rendered for petitioner, and the contestant appeals.

The only question to be decided is whether the fact that the physical printing of the paper is done in one town, and the publication and circulation in another, prevents it from being a newspaper of general circulation within the meaning of the statute. Appellant contends: “The point in this case is that the legislature has undertaken to define a newspaper of general circulation, a term often used by it in the codes and statutes of the state, for the evident purpose of securing publicity for public or official advertising and preventing the abuses in public affairs which would result from its concealment in newspapers devoid of standing, character

and circulation"; and insists it is "not unreasonable to assume that the legislature, when it defined a newspaper of general circulation, meant all that it said in section 4460, and that all of the words therein used are to be given force and effect. . . . The petition in this case at bar assiduously eschews all reference to the place where said paper is printed."

It was said in the case of *In re Le Favor*, 35 Cal. App. 145, 146, [169 Pac. 413]: "From these findings made by the trial judge, it is very apparent that the only ground upon which the denial of the petition was made was because seven issues of the newspaper were not actually 'printed' in the city of Watts. The newspaper was circulated there and was a paper local to that community. We think to construe the statute in such a close and literal sense is to narrow its meaning more than was intended by the legislature. The object to be accomplished was to define newspapers in which public notices might be made and which would fairly express such notices to the particular community intended to be reached. . . . The case of *Bayer v. Hoboken*, 44 N. J. L. 131, is directly in point. There a statute required the printing of a notice in a newspaper 'printed and published' within the limits of a municipality. The newspaper in which the publication was made was printed altogether on presses in the city of New York, but was distributed in Hoboken. The court held that such a newspaper was 'printed and published' as required by the statute." In *Stanwood v. Carson*, 169 Cal. 640, 647, [147 Pac. 562, 565], it was said that "the vital consideration being notice by publication, such publication is the publication contemplated by law, with little or no regard paid to the mere place of printing, even when the word 'printing' coupled with publication is embraced in the statutory requirement. (*State v. Hoboken*, 44 N. J. L. 131; *Ricketts v. Hyde Park*, 85 Ill. 111; *Brown's Estate v. West Seattle*, 43 Wash. 26, [85 Pac. 854]; *Hinchman v. Barns*, 21 Mich. 558; *Greenlee v. Marks*, 62 Ind. 420; *Hart v. Smith*, 44 Wis. 229.)" In *Nebraska Land etc. Co. v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 410, [72 N. W. 357], in considering a statute which required a notice to be published in a paper "printed" in a county, the court said: "We do not think that the word 'print' was by the legislature used in the specific and somewhat



technical sense of designating the purely mechanical act of impressing the characters upon the paper. The object of the statute was to give notice, and, if the legislature had the distinction at all in view, it would not, for that purpose, have selected the place of printing, instead of that of publication. 'Print' is familiarly used in the sense of 'publish,' and in that sense the word receives recognition in many, if not all, of the dictionaries, and in that sense we are satisfied the legislature used it."

[1] The Standard Dictionary gives one definition of "print" as follows: "To put in print, or cause to be put in print or issued from the press; carry or send forth in print; publish; as, the newspaper *printed* the story." The Century Dictionary defines it thus: "To cause to be printed; obtain the printing or publication of; publish," and in Webster's Dictionary this definition is given: "To publish a book, article, music, or the like." [2] To give a reasonable construction to the language of the statute, and keeping in view the object sought to be served by the legislation—that of having an effective medium of publicity for legal notices in the community—it must be held that by the conjunctive "and" it was not intended to require that the physical act of printing was to be done in the place of publication, but merely that the paper be printed and circulated there. We think it clear from this fact and the authorities cited that the word "printed" was used in the statute in the sense of the definitions we have given.

In this case the office of the paper is at Ontario, where it is established, and the tax for conducting the business is paid there. The paper is caused to be printed in Ontario, the printing matter is obtained in, it is published in, and it is circulated at Ontario. In the production of the publication, everything is done at Ontario, save the setting up of the type and making the impressions on the paper. It would be giving too narrow a meaning to the word "printed" to hold that these acts alone were contemplated by its use in the statute. The only reasonable construction that can be given to "printed and published" is that the paper must be produced in the community where it is aimed to have it recognized as a legal advertising medium.

Appellant cites numerous authorities to the well-recognized principle that "some effect is to be given to every word



in the statute, without rejecting any word as redundant or treating it as merely synonymous with some other word or words." But in arriving at our conclusion we have not failed to give effect to the word "printed." Appellant also cites *Application of Devlin and Judah*, 12 Cal. App. 403, [107 Pac. 583], but that case is not in point, for the reason that another statutory qualification was involved—the necessary period the publication must have been established.

Judgment affirmed.

Wilbur, J., Lennon, J., Sloane, J., Shurtleff, J., and Angellotti, C. J., concurred.

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[Sac. No. 3218. In Bank.—October 3, 1921.]

J. P. MILLOTT, et al., Appellants, v. ASSOCIATION OF MARE ISLAND EMPLOYEES (a Corporation), et al., Respondents.

[1] CORPORATIONS — "EXCESS STOCK" — PURCHASE BY CORPORATION.

Where in the articles of incorporation of a corporation formed by employees of one of the navy yards for the purpose of acquiring and operating a ferry in the interest of said employees, it is provided, among other things, that the sale and issuance of stock is with the object of keeping it, so far as permitted by law, in the hands of such employees and that the stock shall be sold upon the condition that the corporation may at any time call in each share of stock held by a stockholder in excess of ten shares by paying therefor the par value with interest at a certain rate, but there is nothing to distinguish the "excess stock" from other stock, this stock is not mere evidence of an indebtedness, or its holders simply creditors of the corporation, and the corporation cannot be compelled, when it has finished its work and is about to dissolve, to repurchase the so-called "excess stock," no reason appearing, appertaining to the conduct of the affairs of the corporation as a going concern, for the purchase of such stock.

APPEAL from a judgment of the Superior Court of Solano County. W. T. O'Donnell, Judge. Affirmed.

The facts are stated in the opinion of the court.

L. G. Harrier and Theodore W. Chester for Appellants.

W. H. Morrissey and Frederick M. Shipper for Respondents.

ANGELLOTTI, C. J.—This is an appeal by plaintiffs from a judgment of the superior court, given upon sustaining a demurrer to the petition, denying an application for a writ of mandate requiring the corporation and its directors to repurchase from the funds of the corporation certain corporate stock styled “excess stock,” prior to a distribution of the assets of the corporation among the stockholders.

It appears from the petition that the corporation has sold all of its personal property and is preparing to dissolve, with the result that the money constituting its net assets will be distributed among the stockholders. Petitioners seek to compel purchase by the corporation from the assets before distribution of all the so-called “excess stock” for an amount per share specified in the by-laws, and the consequent extinction of such stock. The result would be that upon a division of the residue *pro rata* among the remaining stockholders, a larger amount would be received by them than if the distribution was made without such purchase, among all the stockholders, including those holding “excess stock.”

The theory of petitioners is that under the articles of incorporation this “excess stock” is not “stock” in the real sense of the word, but that it in fact simply evidences a loan to the corporation which should be paid before distribution; and that in any event it is the duty of the corporation and its officers to purchase the same at the price fixed by the articles and by-laws.

The corporation was one formed by employees of the federal government at the Mare Island navy yard, its special object being to acquire and operate a ferry between the city of Vallejo and Mare Island in the interest of employees of such navy yard. The articles provided for the sale and issuance of the stock “with the object of keeping” it, so far as permitted by law, in the hands of employees of the yard, and “under such proxy conditions as to voting same as will assure equal voice and vote to all the stockholders.” One of the purposes was to operate such ferry “at a transportation charge that will pay the expenses

of operating the ferry together with eight (8%) per cent per annum to all stockholders subscribing for stock in the corporation, and to create a fund to pay all money borrowed by the corporation and to purchase all the stock that any stockholder may have obtained or acquired in the corporation in excess of ten shares, the stock of the corporation to be sold and issued with the condition that the corporation may at any time call in and acquire each share of stock that any stockholder holds or has acquired in excess of ten shares by paying therefor the par value of each such share together with interest at the rate of eight (8%) per cent per annum on the par value of the stock from the date of its issue, provided that all interests theretofore paid on said stock shall be deducted from the interest to be paid by the corporation in the event of its purchasing such stock." It was provided that the capital stock shall be seventy-five thousand dollars divided into seventy-five thousand shares of the par value of one dollar each.

The term "excess stock," as used in these proceedings, refers to the stock that "any stockholder holds or has acquired in excess of ten shares." So far as the articles of incorporation are concerned, there is nothing to distinguish it from any other stock issued by the corporation, and the articles simply in effect provided that *all* stock should be sold subject to the condition that the corporation might call in, on payment of the specified price and interest, any stock held by a stockholder in excess of ten shares; in other words, that all stock should be sold subject to the condition that the corporation might, at any time, reduce any stockholder's holding to ten shares, by purchasing at the specified rates, the additional amount held by him. All was included in the seventy-five thousand shares of the par value of one dollar each.

Examination of the by-laws discloses nothing to indicate that any stock issued by the corporation was not to be considered as ordinary stock, or its holders other than ordinary stockholders. The holders of *all* stock were undoubtedly "stockholders" within the meaning of article II relative to the election of directors, and of article IV. All stock was to share in dividends under paragraph second of article V, whereby the directors were authorized to declare dividends out of the surplus profits, "when such profits shall, in the opinion

of the directors, warrant the same, and after all debts have been paid, and eight per cent (8%) interest to all stockholders." All stock issued was to be issued as ordinary stock, the only limitation as to issuance to one stockholder of more than ten shares being that in such event a power of attorney or proxy, designed to secure "equal voice and vote to all stockholders" be executed. (Par. 3, art. V and art. XIII.) All stock was to be transferred in the same way. (Art. XIV.) All stock issued was "subscribed stock" and its holders "stockholders" within the meaning of articles XV and XVI relative to meetings and voting. The contention of petitioners is necessarily based on certain other provisions to which we will now refer. By article XX it was provided that *all* stock was to be sold "subject to the right of the corporation to repurchase the same at any time upon paying" one dollar per share and interest, and to such other conditions as the board of directors may deem advisable, "except that no compulsory action shall be taken by the corporation that will reduce the ownership of stock to less than ten shares for each member." It is further declared in this article that this provision is "to the end that the business and affairs of the corporation shall be conducted, maintained, and carried on, in the interest of the majority of its stockholders," and that "the corporation shall repurchase, (the financial condition of the corporation permitting), first, such shares of stock owned and held by any stockholder in excess of ten shares, thereby limiting the ownership of stock to ten shares for each stockholder, and giving to each equal rights and privileges." It is then provided that "the corporation may at any time through its Board of Directors pursuant to the terms and conditions of sale and issuing of stock, repurchase the same whenever it is deemed for the best interests of the corporation and stockholders so to do." It is then provided: "To the end that the stockholders may have equal say and voice, it is deemed advisable that a form of proxy, agreement of sale, and power of attorney, be executed and required of each stockholder as a condition to be complied with before any stock in excess of ten shares may be purchased by any person." The form of this is set forth. By it the purchaser appoints some specified stockholder his agent and

attorney to represent him and vote said stock at all meetings while he remains owner of the stock, limiting the power of such attorney to vote "as the majority of the persons present as stockholders voting cast their votes," and agrees that if he revokes the power of attorney he will sell the stock for one dollar per share (its par value) to said agent, as of the date of revocation. It is further declared that this power of attorney and proxy is not to affect the right of the corporation to purchase said stock "at any time . . . by paying me" one dollar per share and interest.

In article XVII it is provided that no repeal or amendment to the by-laws shall affect the obligations of the corporation to pay eight per cent interest "to its stockholders, or any funds that it may borrow, or any security it may give for funds borrowed, or affect the obligation of the corporation to pay one dollar (\$1.00) per share and interest at eight per cent (8%) to stockholders who have assisted the corporation by purchasing more than ten shares of stock to permit it to raise funds with which to purchase equipment of the ferryboats 'Vallejo,' 'Ellen,' equipment, etc."

The corporation has during its existence repurchased from stockholders so-called excess stock of the value of approximately sixteen thousand dollars. It is in such financial condition that it can repurchase all such stock without detriment to claims of creditors. It sufficiently appears that it has closed the business for which it was incorporated, sold its property and is preparing to dissolve, and that the real burden of the complaint of petitioners, who with other stockholders presumably belong to "the ten share only" class, is that the value of their shares will be smaller on distribution of the assets, by reason of the existence of the so-called excess stock, than it would be if such stock were repurchased by the corporation before distribution at one dollar per share and interest. The corporation has finished its work, and no reason whatever *appertaining to the conduct of the affairs of the corporation as a going concern* exists for the purchase of any outstanding stock.

[1] There appears to us, in the light afforded by the articles of incorporation and the by-laws, no lawful foundation for a conclusion that this so-called "excess stock" is evidence of an indebtedness, or its holders simply creditors of the corporation. The object of the issuance of all the

stock was, of course, to secure money to buy property essential to the establishment and maintenance of the proposed business, but we had thought that such was always a purpose of the issuance of stock. Each person who acquired stock, whether ten shares only or more, became a stockholder in the corporation *with all the rights and liabilities of a stockholder as to all of the stock held by him* for so long as he continued to hold it, subject only in so far as any amount over ten shares was concerned to the right of the corporation, under the terms of the contract, to repurchase the same from him at its par value, with interest at eight per cent per annum. The provision for the payment of par value and interest was simply the fixing by the parties of a purchase price, in the event of the exercise of its option *by the corporation*. The provision in article XVII precluding repeal or amendment of the by-laws in certain particulars, in so far as material here, simply precludes any repeal or amendment of the provisions securing to the stockholder the designated price in the event of a repurchase by the corporation. The general guaranty of eight per cent interest on stock, whatever it means or may be worth, runs invariably, in so far as the by-laws are concerned, to *all* stockholders.

The remaining question is whether the corporation officers can be compelled to repurchase at the fixed price all stock held by any stockholder in excess of ten shares, under the existing circumstances. We may concede for the purposes of the decision the validity in all respects of the provisions of the by-laws relative to this matter. Careful consideration of articles and by-laws leaves no doubt as to the full purpose and scope of these provisions, the same being substantially stated therein. The object was to have the business of this corporation, which was to be confined as far as possible to employees of the Mare Island navy yard, run, in so far as was practicable, according to the desires of the majority of persons who were stockholders rather than according to the desires of the holders of the majority of stock. Equality of "say and voice" to every individual stockholder in the management of the business of the corporation as a going concern, regardless of the amount of stock held by him, was the sole object of all these provisions as to repurchase, as it was with regard to the provisions as to manner of voting, and requirement of proxy. There is to

our minds nothing in articles or by-laws to warrant a conclusion that for some purpose not at all incident to the management of the corporation as a going concern, in this case in the closing of the affairs of the corporation the mere increase in value of certain stock held by certain stockholders to be attained by extinguishing by purchase of their stock the rights of others to participate as stockholders in the distribution of the corporate assets, the corporation or its officers can compel a retransfer of any stock. As we have seen, this corporation has ceased to do business, has sold its property, and is about to dissolve, and apparently has a large residue of money to distribute *pro rata* among its stockholders. So far as the corporation is concerned and the management of its affairs, there is no longer any necessity for or propriety in the repurchase of any stock. The only thing remaining to be done is to dissolve and distribute the assets among the existing stockholders according to their respective holdings. We are satisfied that respondents are not acting in violation of articles of incorporation or by-laws in refusing at this stage to attempt a repurchase of any stock.

The judgment is affirmed.

Wilbur, J., Lennon, J., Sloane, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Shaw, J., and Sloane, J., who were absent.

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[L. A. No. 6553. In Bank.—October 5, 1921.]

LAWRENCE ARMSTRONG FRY, Appellant, v. TITLE INSURANCE & TRUST COMPANY (a Corporation), Respondent.

- [1] SLANDER OF TITLE—VENDOR AND VENDEE—GUARANTY OF TITLE.—In an action by a vendor against a title insurance company for slander of title, where it appears from the complaint that the plaintiff presented to his vendee a duplicate certificate of title issued by the registrar under the Torrens land law, that the purchaser demanded as additional assurance of title a guaranty of the defendant, and this the plaintiff agreed to furnish, that the



defendant declined to furnish such a guaranty of title unless a certain judgment of record was specifically released, that the plaintiff agreed to secure such release, and paid a certain sum for such purpose to the defendant, that thereupon the defendant wrote its guaranty of the title to the purchaser, and the plaintiff secured the purchase money, the vendor is not entitled to recover the amount which the defendant required him to pay as a condition of entering into a guaranty with a third person, plaintiff's vendee, leaving the defendant obligated by its guaranty.

APPEAL from a judgment of the Superior Court of Los Angeles County. Dana R. Weller, Judge. Affirmed.

The facts are stated in the opinion of the court.

Jas. W. Bell for Appellant.

Charles H. Brock and J. N. Hastings for Respondent.

WILBUR, J.—This is an action to recover one thousand dollars damages for slander of title. The defendant interposed a general demurrer to the complaint, which was sustained and judgment entered accordingly, from which plaintiff appeals. The main question thus presented for our consideration is as to whether or not the complaint states facts sufficient to state a cause of action. The slander complained of is alleged as follows:

“That on the thirtieth day of December, 1919 . . . the defendant maliciously and without cause spoke in the presence of Jacob Bosma and others of and concerning the plaintiff and his property as follows: ‘That said property was subject to the lien of a judgment for \$5479.65 plus costs and attorneys’ fees, and that said title could not be transferred free and clear until the release of said judgment lien,’ ” and “That the said statement was false, which defendant then and there well knew.”

The other allegations of the complaint may be summarized as follows: The defendant is engaged in the business of searching titles; the plaintiff and one Jacob Bosma entered into a written contract whereby plaintiff agreed to sell to Bosma a certain piece of real estate for the consideration of four thousand five hundred dollars and to furnish in connection with such sale a certificate of title from the defendant showing said property to be free and clear of all



encumbrances. The plaintiff was the owner of the fee-simple title "subject only to" a mortgage of fourteen thousand dollars and certain street proceedings. "That plaintiff's title . . . was evidenced by registrar's original and owner's duplicate certificates of title No. 7926, dated November 29, 1919, issued pursuant to the provisions and requirements of the law enacted by the people of the State of California on the third day of November, 1914, under the reserved legislative power, known as the initiative, entitled 'An act to amend an act entitled "An act for the certification of land titles and the simplification of the transfer of real estate," approved March 17, 1897,' and brought under first registration by certificate No. C-4318 on the first day of May, 1918." That the plaintiff deposited with the defendant his owner's duplicate of title, number 7926, together with a deed to Bosma and releases of the encumbrances "and instructed defendant to deliver an owner's duplicate certificate to the said Bosma together with its certificate showing the said title to be vested in him free and clear of all encumbrances, and thereupon to turn over to plaintiff the balance of said purchase price, and the said Bosma joined in said instructions." That the said defendant, with the consent of plaintiff, retained the sum of one thousand dollars out of the money so deposited as aforesaid for the purpose of procuring a release of said property from the said alleged judgment lien, and plaintiff consented thereto solely on the representation of the defendant that there was such a lien, and on the further representation of the defendant that it would not issue its said certificate showing said property free and clear of encumbrances unless a release of said alleged judgment lien be procured, and that it could and would procure such release for the sum of one thousand dollars. That thereupon the plaintiff sought to obtain from the said Bosma a rescission of said contract; but the said Bosma refused to consent to a rescission thereof; and notified plaintiff that he would insist upon a specific performance of all its terms and conditions and of the issuance of the said certificate by defendant title company showing said property to be vested in him free and clear of all encumbrances, including said alleged judgment lien, and also at the same time notified plaintiff that any unusual delay in completing said transaction would

cause him loss and damage in excess of one thousand dollars. That plaintiff thereupon sought legal advice, and, after stating all the facts and circumstances fairly and fully to his attorney, was advised that said contract could be specifically enforced by the said Bosma. That solely by reason of the facts and circumstances as herein alleged, plaintiff yielded to the demand of the defendant and authorized it to retain the sum of one thousand dollars out of the purchase price of said property and to close the transaction in accordance with instructions theretofore given. That the defendant during all the times mentioned in the complaint, "maliciously represented that the said registration law under which plaintiff's title or said property was registered was invalid and unsafe and that the defendant would not and did not recognize said law nor attach any force or effect thereto in its said business of making reports and issuing contracts of guaranty of title."

It is not alleged that there was no judgment for the amount of \$5,479.65 of record in the county recorder's office, or in the office of the county clerk, except as such fact may be inferred from the plaintiff's allegation that the statement of the defendant, "That the property was subject to the lien of a judgment," etc., was "false, which the defendant then and there well knew." Taking the complaint as a whole, it is apparent that the plaintiff was claiming, as he now does, that the real property was not subject to any liens not shown on the registrar's certificate and that the defendant "maliciously" claimed that the certificate was not conclusive because the law for its issuance was invalid. The plaintiff's allegation that defendant's statement as to the judgment lien is false evidently takes issue with the defendant upon the validity of the lien, rather than upon the existence of the judgment. That this is the proper construction of the complaint is made manifest by the statements of the attorney who drew it, made in his brief on behalf of appellant in this court, wherein he states as follows:

"The amended complaint alleges that there was no *judgment lien* as claimed by defendant and that the defendant 'maliciously represented that said registration law under which plaintiff's title to said property was registered was invalid,' etc. In view of the decisions of this court in

*Robinson v. Kerrigan*, 151 Cal. 42, [121 Am. St. Rep. 90, 12 Ann. Cas. 829, 90 Pac. 129], and in the *Application of Scott*, 182 Cal. 83, [187 Pac. 9], and of the appellate court, second division, in the *Application of Julius Seick* (Cal. App.), 189 Pac. 314 (Civ. No. 2559), decided February 26, 1920, we believe that the defendant merits the charge of malice.

“Section 91 of the Land Registration Act, Stats. 1915, page 1932, provides: ‘No judgment, or decree, or order of any court shall be a lien on or in anywise affect registered land or any estate or interest therein until a certified copy of such judgment, decree or order under the hand and official seal of the clerk of the court in which the same is of record is filed in the office of the registrar and a memorial of the same is entered on the register of the last certificate of the title to be affected.’

“In the *Application of Seick, supra*, the court, in construing section 77 of the same act requiring notice of tax sale to be filed with the registrar within five days, the contention being that the statute is directory and not mandatory, says: ‘We cannot accede to this construction of the plain and unambiguous language of the law.’ And again the court says in the same opinion:

“‘The prime purpose of the Torrens law is that there shall be in the registrar’s office in the book known as the “register of titles” a leaf or folium to which any person dealing with any particular piece of land that has been brought under the act may look in order to ascertain the exact condition of the title before purchasing, leasing or loaning money secured by mortgage.’

“All of the allegations of the amended complaint for the purpose of the demurrer are to be taken as true. It is clear, therefore, that the amended complaint states a cause of action for slander of title, and if the proof sustains the allegations plaintiff is entitled to recover.”

It is apparent from a reference to the cases cited by appellant in this paragraph of his brief, and from the brief itself, that the allegation of the plaintiff that the statement of the defendant was “maliciously false” was made in the complaint because the Torrens land law is plain in its terms, and has been upheld by the courts in the cases cited, and that, therefore, the statement by the defendant of the con-

dition of the title could not have been an honest expression of opinion. [1] In short, the situation disclosed by the complaint is as follows: The plaintiff presented to his vendee a duplicate certificate of title issued by the registrar under the Torrens land law; the purchaser demanded as additional assurance of title a guaranty of the defendant and this the plaintiff agreed to furnish; the defendant declined to furnish such a guaranty of title unless a judgment of \$5,479.65 of record was specifically released; the plaintiff agreed to secure such release, and paid one thousand dollars for such purpose to the defendant; thereupon the defendant wrote its guaranty of the title to the purchaser, and the plaintiff secured the purchase money; he now seeks to recover the one thousand dollars, which the defendant required him to pay as a condition of entering into a guaranty with a third person, plaintiff's vendee, leaving the defendant obligated by its guaranty. If the defendant had retained the one thousand dollars as a consideration for its outstanding guaranty, could the plaintiff recover it and his purchaser retain the guaranty secured by the payment of the thousand dollars? Obviously not. If not, it is even more clear that where the one thousand dollars was paid out to so perfect the title that the purchaser would accept it, and the defendant guarantee it, the plaintiff having consented to this transaction and enjoyed the benefit of it, ought not be allowed to recover the money he paid out in order to get the benefit.

The question as to whether the Torrens land law was valid or invalid, or whether the defendant honestly so believed, is entirely beside the question. The plaintiff knew all about his title; the purchaser did also. Both knew of the registrar's certificate, and they differed as to its effect, the purchaser being unwilling to accept the certificate alone. Plaintiff contracted to buy for his purchaser a guaranty issued by the defendant. The defendant sold to plaintiff the required guaranty, for its usual fees, plus one thousand dollars, to be paid to a lien claimant. Plaintiff agreed to pay this amount after securing the advice of an attorney and with full knowledge of the facts solely because he felt bound to his purchaser to do so, and being fully aware that defendant's contention was based upon a "maliciously," wrong and "false" view as to the effect of a statute. It is,

therefore, clear that the loss or damage to the plaintiff was due, not to the interference by the defendant with the contractual rights and obligations of the parties to the contract, nor to the prevention of any sale, but to the defendant's insistence that it would not furnish a certificate of title unless the plaintiff conformed to its demand for the satisfaction of the judgment lien.

The defendant had a right to fix the terms upon which it would enter into the contract of guaranty (*Allen v. Railroad Com.*, 179 Cal. 68, [8 A. L. R. 249, 175 Pac. 466]; *Taggart v. Graham*, 39 Cal. App. 621, [179 Pac. 688]). The damages alleged by plaintiff did not result from a slander of title. In the case of *Burkett v. Griffith*, 90 Cal. 532, [25 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527] an agreement of sale had been entered into between the plaintiff and his vendee. The vendee, because of the alleged slander of title, declined to carry out his agreement. It was held that the plaintiff could not recover. This court there stated the rule as follows: "In an action like the present, the plaintiff can recover only such damage as he may have sustained by reason of an intending purchaser being prevented from making the contract; but the complaint herein shows that whatever statements or declarations were made by the defendant prior to the making of the contract did not have the effect to prevent Sketchley from entering into the same, and those which he made thereafter have not caused the plaintiff any damage which can be said to have resulted therefrom. We know of no case in which it has been held that when the plaintiff has a valid contract of sale he can recover damages for its breach against one whose words, however false and malicious, have induced the other contracting party to violate such agreement." The court held that if the purchaser was released by the vendor on account of the slander, such release was his own voluntary act, and the vendor could not recover (*Id.*, p. 541), if not, that he had not been damaged. Here the plaintiff with less justice is complaining, not that he lost a sale, but that he was forced to complete one. It is clear in any view of the case that the statement of the defendant as to the condition of plaintiff's title was not the proximate cause of his loss, which resulted from his voluntary payment, with full knowledge of all the facts. (*Burkett v. Griffith*, *supra*. See, also, as to voluntary payments,

*Brumagim v. Tillinghast*, 18 Cal. 265-271, [79 Am. Dec. 176]; *Burke v. Gould*, 105 Cal. 277, [38 Pac. 733].)

We cannot see that plaintiff has made out a case of payment under duress. Plaintiff in this behalf relies upon *Burke v. Gould*, *supra*, and *McTigue v. Arctic Ice Cream Co.*, 20 Cal. App. 708, 718, [130 Pac. 165]. These cases recognize that the possessor of personal property may exercise duress over the owner in certain cases by unlawfully refusing to surrender the possession thereof to the owner until his illegal demands are met, and have no applicability to the facts of this case, for the defendant had no possession of any property which it refused to deliver. The payment made by plaintiff was not made to secure his property from the defendant, but to secure a contract of guaranty from the defendant which it would not otherwise have entered into.

Judgment affirmed.

Angellotti, C. J., Lennon, J., Lawlor, J., Sloane, J., and Shurtleff, J., concurred.

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[Sac. No. 2912. In Bank.—October 6, 1921.]

PACIFIC PORTLAND CEMENT COMPANY, CONSOLIDATED (a Corporation), Appellant, v. PLACER COUNTY LAND COMPANY (a Corporation), Respondent.

- [1] **VENDOR AND VENDEE—FAILURE OF TITLE—NONLIABILITY FOR DAMAGES—NOTICE.**—In an action to foreclose a purchase money mortgage, the defendant cannot recover damages for failure of title to a portion of the land, in the absence of fraud, although the conveyance to him included this portion of the land, where the grantor knew that it did not have title thereto, or at least that a railroad company was occupying and claiming it adversely, and the grantee was aware that at least some portion of this land was claimed and occupied by the railroad as a right of way.
- [2] **Id.—GRANT BY CONGRESS—ADVERSE CLAIM—NOTICE.**—An act of Congress under which land is claimed by a railroad company, being a public statute, is constructive notice to both parties to a conveyance of the land of the adverse claim of the railroad company.

- [3] **ID.—EXAMINATION OF TITLE — MISTAKE — RESCISSION.**—It is well settled that, in the absence of fraud or an agreement, express or implied, for a good or particular title, a purchaser of land buys at his peril and is bound to look to the title and competency of the vendor. Therefore a purchaser cannot rescind on the ground that he was mistaken as to his vendor's title. But where both parties are under a mistake as to the vendor's title, equity will relieve the purchaser from the contract.
- [4] **ID.—EXPRESSION OF OPINIONS.**—Mere expressions of opinion as to the sufficiency of the title, when the means of information are equally accessible to both parties, or the same facts are within the knowledge of both parties, and when no confidential relation exists between them, do not constitute fraud or deceit on the part of the vendor. It is a mere statement of opinion, and does not justify the party to whom the statement is made in relying thereon.

APPEAL from a judgment of the Superior Court of Placer County. J. E. Prewett, Judge. Reversed.

The facts are stated in the opinion of the court.

Pillsbury, Madison & Sutro, A. E. Roth and Marshall P. Madison for Appellant.

Geo. W. Hamilton for Respondent.

**SLOANE, J.**—This action was begun by plaintiff to foreclose a purchase money mortgage on land conveyed by plaintiff to defendant. There was a cross-complaint by defendant to recover damages from failure of title to a portion of the land. Judgment was for the defendant, and the plaintiff appeals.

The only matters in dispute arise under the averments of the cross-complaint that the agreement with and deed to the defendant called for a tract containing twenty-two and one-half acres, whereas plaintiff only had title to sixteen acres of the tract conveyed. The deed to defendant described the land by courses and distances as follows: "Beginning at the northeast corner of the west half of the northeast quarter of section ten in township twelve, north, range eight east, Mount Diablo base and meridian, and running thence south

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4. Misstatement as to title to real property sold as matter of opinion, notes, 28 L. R. A. (N. S.) 206; 39 L. R. A. (N. S.) 1143.



along the line between the east half and the west half of the northeast quarter of section ten a distance of 1320 feet to a stake; thence at right angles west a distance of 802 feet to the center line of the Central Pacific railway track; thence in a northerly direction along said center line of said railroad track to its intersection with the north line of said section ten; thence east along the north line of said section 10 a distance of 669 feet to the place of beginning; being a fractional part of the north half of the west half of the northeast quarter of said section 10." No reference is made in the deed to the acreage of the tract, but it is in evidence that a computation of the area inclosed within the described boundaries shows that it comprises twenty-two and one-half acres.

It is conceded that the Southern Pacific Company, as successor to the Central Pacific Railway Company, at all times affected by these proceedings, owned a strip of the above-described premises two hundred feet in width along the entire westerly line, described as the "center line of the Central Pacific Railway track," and to the east thereof, comprising about six acres, and to which strip the plaintiff at no time had any title. For many years prior to the conveyance in question the railway companies had occupied the westerly part of this strip as a right of way for their tracks and had maintained a fence on the easterly line between such strip and the remaining premises covered by plaintiff's deed.

It is from the failure to obtain title to this strip of land under the deed from plaintiff to defendant that the controversy on this appeal arises.

The trial court, after finding the facts as above stated, further found that the plaintiff and its agents had knowledge of "the existence of the tracks and fence lines constructed and maintained over and across such mortgaged premises," and were advised and informed of the fact that all the right, title, or interest or estate that they or either of them had in or to said strip was "subject and subordinate to the rights, claims, and title of the railway company," but that neither plaintiff nor its agents advised or informed the defendant thereof.

This finding is followed immediately by the further inconsistent and apparently irreconcilable finding that neither

the plaintiff nor the defendant "had knowledge or were otherwise informed or advised" of the fact of ownership and right of possession by the railway company of the strip or parcel of land hereinbefore described.

As the evidence indisputably shows that all of the parties to this action knew and had known for years that the railway company was maintaining its tracks upon this strip of land and was maintaining the fence hereinbefore referred to, and as the deed itself carries the west line of the land conveyed to and along the center of a railway track, the only explanation for the finding that neither plaintiff nor defendant knew of the railway's ownership or right of possession, is that the court intended to find that neither of them was informed of the nature or validity of the railway company's right or title. That such was the situation is a fair inference from the testimony in the case. It is clearly evident from the testimony of the agents of defendant who conducted the negotiations for the purchase of this land that they knew of the occupancy of this strip or some portion of it by the railway company, and that it was claimed and used by said company for a right of way and that the railway company was maintaining the fence along the easterly border of this strip, thus separating it from the main part of the tract. Before the purchase was consummated defendant was furnished with an abstract of title to the entire tract, and in one of the transfers set out in the abstract there was a reservation "saving and excepting the right of way of the said Central Pacific Railroad Company." The call in each of the several conveyances for the "center line of the Central Pacific Railroad track," as one of the boundaries, must have served as notice that the railway company was claiming and occupying some portion of the tract as a right of way. Defendant's agents admitted that they had previous knowledge of litigation between the railroad and other land owners over this two hundred foot right of way extending across adjacent lands. This two hundred foot strip is claimed by the railway under an early congressional grant. The title of the company had, it was claimed, in one instance at least, been successfully contested, and defendant's agent and representative testified to knowledge that similar litigation had occurred on other sec-

tions of the railway line in that neighborhood and "that sometimes the railroad company wins and sometimes loses."

That defendant had notice that some portion of the tract it was bargaining for was occupied and claimed as a railroad right of way is beyond question. That such claim extended from the railway track to the line of fence was suggestively apparent.

The only reasonable conclusion is that both parties to the transaction understood that the disputed strip was included in the conveyance, as it had been in the several previous deeds in the chain of title, to pass to the grantee any interest that might be maintained against the railroad company, but with full knowledge of the railway's possession and subject to any valid claim it might have.

[1] The theory upon which the trial court made its findings in favor of defendant, namely, that the inclusion of the entire acreage in this conveyance was the result of the mutual belief of both parties to the transaction that plaintiff had an undisputed title to this right of way strip clearly cannot be maintained, and upon no other theory presented by the facts or the findings can the defendant defeat plaintiff's action or recover on its cross-complaint. Fraud is not alleged in the pleadings, and the defendant at least had sufficient notice of the railroad's right of way to put it on inquiry. Indeed, it knew of the adverse claim to some portion of this tract, and the duty was imposed upon it to make investigation as to the extent of the railroad's rights.

That the deed to defendant calls for this two hundred foot strip is undisputed, but it is equally clear that the grantor knew that it did not have title thereto, or at least that the railroad company was occupying and claiming it adversely, and the grantee was aware that at least some portion of the strip was claimed and occupied by the railroad as a right of way. [2] Even the act of Congress under which the two hundred feet of land claimed by the railway company was granted, being a public statute, was constructive notice to both parties of this adverse claim. (*Central Pac. Ry. Co. v. Droge*, 171 Cal. 32, 42, [151 Pac. 663].)

Eliminating the findings of mutual mistake, and any question of fraudulent misrepresentation, or express covenants

of title, and the application of the rule of *caveat emptor* becomes too plain to require argument or authority.

[3] The general rule applicable is stated in 39 Cyc., page 1252, as follows: "It is well settled that, in the absence of fraud or an agreement, express or implied, for a good or particular title, a purchaser of land buys at his peril, and is bound to look to the title and competency of the vendor. Therefore a purchaser cannot rescind on the ground that he was mistaken as to his vendor's title. But where both parties are under a mistake as to the vendor's title, equity will relieve the purchaser from the contract."

The most that can be said in support of defendant's case here is that the plaintiff, its vendor, represented that it had title to this disputed strip; but in the face of the fact that both parties to the transaction had knowledge of the adverse claim and possession of the railroad company, this representation becomes a mere statement of opinion as to the legal effect of the adverse claim.

[4] "Mere expressions of opinion as to the sufficiency of the title, when the means of information are equally accessible to both parties, or the same facts are within the knowledge of both parties, and when no confidential relation exists between them, do not constitute fraud or deceit upon the part of the vendor. It is a mere statement of opinion, and does not justify the party to whom the statement is made in relying thereon." (*Choate v. Hyde*, 129 Cal. 580, [62 Pac. 118]; *Nounnan v. Sutter County Land Co.*, 81 Cal. 1, [6 L. R. A. 219, 22 Pac. 515]; *Rheingans v. Smith*, 161 Cal. 362, [Ann. Cas. 1913B, 1140, 119 Pac. 494].)

If defendant was misled in entering into this purchase it was not because of any mistake as to the acreage of the tract. It is not disputed that the deed purported to convey the entire twenty-two and one-half acres bargained for. The mistake, if any, was as to the title to the strip included in the railroad's right of way, and, as has been pointed out, both parties were in possession of the facts which showed that plaintiff's claim of title was at least doubtful and its representation of ownership merely a matter of opinion.

The undisputed facts in this case clearly indicate that the conveyances of this strip by the owners of record through a considerable chain of title were accepted with knowledge of the adverse claim of the railroad, and the defendant here

in its turn took a sporting chance, which it confessedly thought at the time of the purchase was good, that the railroad's title could be defeated. Under such conditions it cannot avoid its liability for the purchase price.

The judgment is reversed.

Lennon, J., Wilbur, J., Lawlor, J., and Angellotti, C. J., concurred.

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[S. F. No. 9792. In Bank.—October 7, 1921.]

PAUL COULTER, Appellant, v. C. A. POOL, as Auditor, etc., et al., Respondents.

- [1] **STATUTES—COUNTY ENGINEER ACT—CREATION OF PUBLIC OFFICE.**—The County Engineer Act (Stats. 1919, pp. 1290, 1295) contemplates the creation of a county office and does, in fact, provide for something more than a mere employment by the board of supervisors of a person to be known as the county engineer.
- [2] **ID.—STATUTORY CONSTRUCTION.**—Cardinal rules of statutory construction require an interpretation of a statute which will give effect to the legislative intent, if consistent with the real object and purpose of the statute.
- [3] **ID.—DECLARATION OF LEGISLATURE — EFFECT OF.**—A legislative declaration, whether contained in the title or body of a statute, that the statute was intended to promote a certain purpose is not conclusive on the courts and they may and must inquire into the real, as distinguished from the ostensible, purpose of the statute, and determine the fact whether, after all has been said and done by the legislature, the statute, in its scope and effect, departs from the declared legislative design and contravenes the fundamental and supreme law of the state.
- [4] **ID.—PUBLIC OFFICE — CHARACTER OF — HOW DETERMINED.**—The definition and application of the words "public office" depend not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation.
- [5] **ID.—DEFINITION.**—A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or inci-

dental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public.

- [6] **ID.—NATURE OF PUBLIC OFFICE.**—A public officer is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. Their characteristics are a fixed tenure of position, the exaction of a public oath of office, and perhaps, an official bond, the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and the payment of his salary from the general county treasury.
- [7] **ID.—COUNTY OFFICER—DEFINITION.**—A county officer is a public officer and may be specifically defined to be one who fills a position usually provided for in the organization of counties and county governments, and is selected by the political subdivision of the state called the "county" to represent that governmental unit, continuously and as part of the regular and permanent administration of public power, in carrying out certain acts with the performance of which it is charged in behalf of the public.
- [8] **ID.—COUNTY ENGINEER ACT—FAILURE TO SPECIFY COMPENSATION.** The County Engineer Act is practically inoperative because it specifies no compensation for the office, and any ordinance of a board of supervisors attempting to fix the salary of a person appointed to the position of county engineer is void to that extent, because the constitution imposes upon the legislature, exclusively, the duty of regulating the compensation of all county officers, unless a county has adopted a charter in accordance with the provisions of sections 7½ or 7½a, article XI, of the constitution, or there is some other express constitutional exception.
- [9] **ID.—COUNTY OFFICERS—FIXING SALARY—DELEGATION OF POWER—CONSTITUTIONAL LAW.**—The state legislature cannot directly delegate to the board of supervisors of the various counties the power of fixing the compensation of a county officer.
- [10] **ID.—UNIFORM SYSTEM OF COUNTY GOVERNMENTS — CONSTITUTIONAL LAW.**—The constitution contemplates and commands that the system of county governments shall be uniform throughout the state, except in those special instances where the constitution itself sanctions a departure from uniformity, such, for instance, as in the case of counties or consolidated cities and counties which adopt charters in accordance with the provisions of sections 7½ and 7½a of the constitution.

[11] **ID.—DEFINITION OF "SYSTEM."**—The word "system," as employed in the constitution, means an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete, harmonious whole, and it necessarily imports both a unity of purpose and entirety of operation.

[12] **ID.—COUNTY ENGINEER ACT — UNCONSTITUTIONALITY OF.**—Inasmuch as the County Engineer Act provides for a county office, involving the exercise of political functions, it violates the constitutional requirement that the system of county governments prescribed by the legislature shall be uniform throughout the state, by reason of the fact that it is not mandatory in its operations, but it is optional with each county whether or not the office provided for by the act shall be established therein.

**APPEAL** from a judgment of the Superior Court of Sonoma County. Emmett Seawell, Judge. Reversed.

The facts are stated in the opinion of the court.

W. F. Cowan and R. M. F. Soto for Appellant.

G. W. Hoyle for Respondent.

**LENNON, J.**—In this proceeding the plaintiff sought, and was denied, *mandamus* to compel the defendants, respectively the auditor and the treasurer of the county of Sonoma, to audit and pay the claim of plaintiff presented against said county in the sum of \$39.24 for labor alleged to have been performed by the plaintiff upon certain of said county's highways.

The claim in controversy is founded primarily upon the admitted fact that plaintiff performed labor upon said highways under and by virtue of the direction and authority of one of the supervisors of said county elected from and representing the supervisorial district in which the labor was performed and who, by virtue of his office, was road commissioner for said district and, as such commissioner, was given supervision of the highways in his district. (Pol. Code, secs. 2641, 2645.) The labor which is the basis of the claim in controversy was performed on July 26, 1919, subsequent to the appointment by the board of supervisors of a county engineer, made pursuant to the provisions of an act entitled "An act providing for a county engineer for



each county in the state, . . . his appointment, manner of removal, qualifications, compensation and duties; transferring to such engineer certain powers, functions and duties heretofore vested in and performed by the county surveyor and members of the board of supervisors; . . . to provide for abolishing the office of county surveyor and for the fixing and levying of taxes for road purposes." (Stats. 1919, p. 1290.) Section 13 of this act provides that it shall be known and designated as "the County Engineer Act," and it will be hereinafter referred to by that title. (Stats. 1919, pp. 1290, 1295.) In keeping with the provisions of this act, the board of supervisors, when appointing the county engineer for a term of four years, fixed his salary at the sum of \$350 per month, and the number and compensation of his assistants. Said labor was performed by plaintiff without, and never has had, the authority, inspection, and approval of said county engineer as required by the provisions of subdivision b of section 5 of said act. The claim in question was, however, approved and allowed by the board of supervisors as a legal charge against the county, apparently upon the theory that, inasmuch as an ordinance, passed subsequent to the ordinance appointing the county engineer, with apparent intent to do so, excluded the supervisorial district in which the labor involved was performed from the scope and operation of the ordinance appointing the engineer, it thereby, in effect, left the supervisor of that district as the *ex-officio* road commissioner thereof in control of the work to be done on the highway therein to the exclusion of the authority and direction of the county engineer. The writ seeking an order directing the auditing and payment of the claim thus allowed was denied by the court below upon the theory that the County Engineer Act, having been adopted by the board of supervisors of Sonoma County, applied throughout that county; that the board of supervisors had no authority to except one district of that county from the operation of the act, and that plaintiff's claim was, therefore, void on its face because the work performed by plaintiff was not performed under the provisions of the County Engineer Act. The proceeding in *mandamus* is now here upon appeal of the plaintiff.

We shall concern ourselves only with the constitutionality of the act, for if it be held, as we think it must, to be un-

constitutional, then it does not invalidate the plaintiff's claim and there is no need to discuss and decide the several remaining questions involved in the appeal.

[1] At the outset we are satisfied that the act in question contemplates the creation of a county office and does, in fact, provide for something more than a mere employment by the board of supervisors of a person to be known as the county engineer. And we are convinced that this is so despite the verbiage of the act, industriously employed, which, among other things, declares that the county engineer appointed by the board of supervisors "shall be deemed an employee and not a county officer . . . subject to the control and supervision of the board of supervisors."

[2] We are not unmindful of the cardinal rules of statutory construction which require an interpretation of a statute which will give effect to the legislative intent which, if consistent with the real object and purpose of the statute, must be adopted, and, doubtless, the express legislative declaration found in section 1 of the act purporting to designate the official character of the county engineer and specifying the category in which, when appointed, he and his duties must be considered and treated, tends in some degree to show the legislative intent to provide that the county engineer was to be a mere employee of the board of supervisors and not a county officer who was to be part and parcel of that uniform system of county government contemplated and commanded by the constitution. (Const., art. XI, sec. 4.) While ordinarily it is the rule that, when the law-making power distinctly states its design in the enactment of a particular statute, no room is left for construction, nevertheless, as the district court of appeal well said during its discussion of this phase of the case, "The label placed by the legislature upon its work cannot be permitted to give it a meaning not fairly contemplated within its terms." [3] In other words, a legislative declaration, whether contained in the title or in the body of a statute, that the statute was intended to promote a certain purpose is not conclusive on the courts, and they may and must inquire into the real, as distinguished from the ostensible, purpose of the statute, and determine the fact whether, after all has been said and done by the legislature, the statute, in its scope and effect, departs from the declared legislative design and contravenes

the fundamental and supreme law of the state. (*Matter of Jacobs*, 98 N. Y. 98, 110, [50 Am. Rep. 636]; *State v. Kedmon*, 134 Wis. 89, 107, [126 Am. St. Rep. 1003, 15 Ann. Cas. 408, 14 L. R. A. (N. S.) 229, 114 N. W. 137]; *Mugler v. Kansas*, 123 U. S. 623, [31 L. Ed. 205, 8 Sup. Ct. Rep. 273, see, also, Rose's U. S. Notes].) This being so, it cannot be rightfully held that, standing alone, the legislative declaration, in the instant case, compels the conclusion without more ado that the act in question did no more than provide for the mere employment of a county engineer and did not, in truth and in fact, attempt to create a county officer to be known as the county engineer. A proper construction of the act requires that due regard be given to the real object of the act. (*People v. Dana*, 22 Cal. 11; *Genilla v. Hanley*, 6 Cal. App. 614, [92 Pac. 752].) This may, we think, be readily ascertained, despite the legislative declaration to the contrary, by a consideration of the requirements of the act as gathered from the context of the act in its entirety.

Looking, then, to the context of the act in its entirety for the purpose of ascertaining its real, as distinguished from its ostensible, purpose, we are first brought to a consideration of the question of what distinguishes a public office from a mere employment. The words "public office" are used in so many senses that it is hardly possible to undertake a precise definition of the meaning and purpose of the phrase which will adequately and effectively cover every situation. It is far less difficult to conceive and comprehend the requirements which characterize a public office than it is to formulate a definition thereof which will have universal application and be entirely free from fault. [4] Its definition and application depend not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation. (*Knox v. Los Angeles County*, 58 Cal. 59; *Mechem on Public Offices*, sec. 4; *Hartigan v. Board*, 49 W. Va. 14, [38 S. E. 698].) [5] A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is not tran-

sient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. (*State v. Jennings*, 57 Ohio St. 415, [63 Am. St. Rep. 723, 49 N. E. 404].)

[6] A public officer is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. There are other incidents which ordinarily distinguish a public officer, such, for instance, as a fixed tenure of position, the exaction of a public oath of office and, perhaps, an official bond, the liability to be called to account as a public offender for misfeasance or nonfeasance in office and the payment of his salary from the general county treasury. (*United States v. Hartwell*, 6 Wall. 385, [18 L. Ed. 830, see, also, Rose's U. S. Notes]; *United States v. Germaine*, 99 U. S. 508, 511, [25 L. Ed. 482]; *People v. Langdon*, 40 Mich. 673; *State v. Jennings*, *supra*; *Knox v. Los Angeles County*, *supra*.) [7] As a matter of course, in keeping with these definitions, a *county* officer is a *public* officer and may be specifically defined to be one who fills a position usually provided for in the organization of counties and county governments and is selected by the political subdivision of the state called the "county" to represent that governmental unit, continuously and as part of the regular and permanent administration of public power, in carrying out certain acts with the performance of which it is charged in behalf of the public. (*Sheboygan Co. v. Parker*, 70 U. S. 93, [18 L. Ed. 33]; *State v. Samuelson*, 131 Wis. 499, [111 N. W. 712]; *State v. Higginbotham*, 84 Ark. 537, [106 S. W. 484].)

Measuring the provisions of the act hereinabove referred to by the authorities just cited, it seems evident, beyond argument, that the so-called "employee" provided for in the statute in question is, in fact, a public and a county officer. The act specifies that the tenure of the position of county engineer shall be a term of four years from the date of his

“appointment,” providing for removal only in the event of inefficiency, malfeasance, or misconduct in office and then upon written charges filed with the board of supervisors and after a hearing of the charges by said board, and, if found guilty, the board must forthwith remove him from “office” and shall immediately appoint his “successor” in the manner provided in the act. The act also requires that “Prior to entering upon the duties of his employment the county engineer shall file with the county clerk the *oath of office as prescribed for the county officers* and a bond conditioned upon the faithful performance of his duties, with sufficient sureties approved by a judge of the superior court, in the sum of five thousand dollars.” (Italics ours.) The salary, which is to be fixed by the board of supervisors, “shall be paid monthly out of the county treasury of the county in which he is appointed and in the same manner as county officers. . . . *provided, however,* that the compensation of the county engineer in any county shall not be less than the compensation received by the county surveyor of that county at the time said county engineer is first appointed.” With respect to duties, it is provided that, among other things, “The county engineer shall be *ex-officio* road commissioner of and for each and every road district of his county and, subject to the control and supervision of the board of supervisors as herein provided, shall . . . make, or cause to be made, all surveys, maps, plans, specifications and estimates necessary or required for the construction, improvement, maintenance and repair of the county roads, highways and bridges, and shall, from and after the first Monday in September, 1919, have and exercise all the powers and duties, and perform all the functions which are now by law conferred or imposed upon county surveyors. . . . ” The act further provides that the county engineer “may also hold and perform the duties of the office of county surveyor, but in all such cases no salary or other compensation shall be paid to him as county surveyor,” and that he shall, at regular monthly meetings of the board, make a report to the board containing “the recommendation of acceptance or rejection of any public work completed, and all official announcements or statements which the engineer is required to make to the board” and “submit to the board of supervisors a certificate over his own signature

and official seal to the effect that such work by the contractors thereof has been completed in accordance with the specifications thereof and recommending its acceptance." The act in terms provides that, upon the appointment of the county engineer, the county office of county surveyor shall, in certain specified contingencies, be deemed abolished; nevertheless, as is evidenced by some of the provisions above set forth, the office and duties of the county surveyor are, in effect, by the act in question, merged into the office and duties of the county engineer. The county surveyor, under the general law in force throughout the state, is a county officer (Pol. Code, sec. 4013), and as such is required to do certain designated county work, not specially mentioned in the act in question, pertaining to the governmental functions of the county. (Pol. Code, sec. 4214 et seq.) The legislature, therefore, attempted to transfer the burden of the duties of the county surveyor to the so-called county engineer, in conjunction with the added and different duties imposed upon him by the act in question. That this is so is further evidenced by an amendment to the County Engineer Act, in 1921, by which a provision was added to the effect that, upon the petition of a certain percentage of qualified electors of the county, the board of supervisors in any county which shall have adopted the provisions of the act "shall discontinue such office of county engineer by ordinance declaring their intention so to do and in such ordinance the board shall provide that the person holding the office of county engineer at the time the ordinance becomes effective shall be and become the county surveyor of such county until the next ensuing general election . . . " (Stats. 1921, p. 934.)

[8] That the position of county engineer is in fact a county office is apparent, in view of the authorities previously cited, from the provisions of the act above quoted and referred to, namely, the provision for trial and removal of the county engineer in the event of misfeasance or nonfeasance in office, the fixing of the tenure of office, the requirement of a bond and the taking of the oath prescribed for county officers, payment of salary from the general county treasury, the political and governmental nature of his duties and the relation between the position of county engineer and the office of county surveyor. "Clearly, it was a county

office.” (*Reed v. Hammond*, 18 Cal. App. 442, [123 Pac. 346].) This being so, it may be stated, in passing, that it follows that the County Engineer Act is practically inoperative for the reason that the act itself specifies no compensation for the office, and any ordinance of a board of supervisors attempting to fix the salary of a person appointed to the position of county engineer is void to that extent for the reason that the constitution imposes upon the legislature, exclusively, the duty of regulating the compensation of all county officers, unless a county has adopted a charter in accordance with the provisions of sections 7½ or 7½a of article XI of the constitution, or there is some other express constitutional exception. [9] The state legislature cannot directly delegate to the boards of supervisors of the various counties the power of fixing the compensation of a county officer. (Const., art. XI, sec. 5; *Dougherty v. Austin*, 94 Cal. 601, [16 L. R. A. 166, 28 Pac. 834, 29 Pac. 1092].)

Concluding, as we do and must, that the position of “county engineer” which the legislature attempted to provide for by the act under consideration is in truth and in fact a county office, we are then confronted with the question of whether or not the act, if permitted to become operative, is in keeping with and does not violate the mandatory provision of the constitution, which requires that “The Legislature shall establish a system of county governments which shall be uniform throughout the State . . . ” (Const., art. XI, sec. 4.)

We may concede, for the purpose of discussion, that the rule prohibiting the delegation of legislative powers by a state legislature does not necessarily prohibit a conditional statute, the taking effect of which, in each locality, may be made to depend upon such subsequent event as its approval by the electors of that locality. Likewise, it may be conceded that the act in question may be said to be a general and uniform law because the general provisions thereof are applicable alike to every county in the state. [10] The fact remains, however, that the constitution contemplates and commands that *the system of county governments shall be uniform throughout the state*, except in those special instances where the constitution itself sanctions a departure from uniformity, such, for instance, as in the case of counties or consolidated cities and counties which



adopt charters in accordance with the provisions of sections 7½ and 7½a of the constitution. There is no section of the constitution which specially excepts the political functions dealt with by the act in question from the requirement that the general scheme of county governments provided for by the legislature must be uniform throughout the state. Therefore, if the County Engineer Act will, in its operation, necessarily tend to interfere with this uniformity, it is unconstitutional and void.

Section 1 of the act provides that "The board of supervisors of any county at their option may appoint, and upon petition therefor signed by qualified electors of the county equaling in number not less than twenty-five per cent of the total vote cast in the county for governor at the last preceding election at which a governor was elected, they must appoint a competent civil engineer . . . as county engineer." Section 11 provides that, if the provisions of the act are adopted in a county by the appointment of a county engineer, the office of the county surveyor shall be abolished either upon the date upon which the appointment is made and accepted if the person who holds the office of county surveyor is the one appointed county engineer, or, in other cases, upon the expiration of the term of the person who holds the office of county surveyor at the time the appointment of county engineer is made. By the 1921 amendment, previously mentioned, the office of county engineer may be abolished and that of county surveyor reinstated, upon the petition of a certain percentage of electors. It is evident, therefore, that the act is not mandatory in its operation. To the contrary, it is provided in the act that the question as to whether its provisions shall become operative in any particular county or whether that county shall continue under the provisions of the general law on the subject heretofore in force, is a matter to be determined, in the last analysis, solely by a percentage of the electors of that county. This being so, the act by its express terms renders possible, and probable, a situation where, in one or more of the counties of the state, the duties of surveying and fixing the boundaries of the public lands and roads, etc., would be performed by the county surveyor, an officer elected by the people of the respective counties and subject to the rules governing elected officials, while in

another or other counties there might be an arrangement whereby these same duties would be performed by an official appointed by the board of supervisors, which official would, in addition to the duties prescribed by the general law for county surveyors, also perform the various duties set forth in section 5 of the County Engineer Act. In the counties operating under the general law, each supervisor is *ex-officio* road commissioner in his supervisorial district, whereas, in counties electing to adopt the provisions of the County Engineer Act, the county engineer would be "*ex-officio* road commissioner of and for each and every road district of his county."

[11] The word "system," as employed in the constitution, means an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete, harmonious whole, and it necessarily imports both a unity of purpose and entirety of operation. (*Welsh v. Bramlet*, 98 Cal. 219, [33 Pac. 66]; *Board v. State*, 26 Okl. 366, [109 Pac. 563]; *State v. Riordan*, 24 Wis. 484.) As previously indicated, uniformity means consistency, resemblance, sameness, a conformity to one pattern. In this resemblance, in this sameness, in this conformity of a class to one pattern, consists the uniformity of system which is essential to the creation and continuity of a uniform system. And, therefore, the constitutional mandate to establish a uniform system of county government throughout the state means one system applicable alike in all its parts and continuously operating equally in all of the counties of the state. If a particular county were expressly exempted from the operation of the act in question, there would be no doubt but that it would violate the uniformity of system contemplated and required by the constitution. And, while in the act under consideration, no particular county is expressly exempted from the operation of the law, nevertheless people of any one or more counties may, without regard to any action taken by the remaining counties, determine that they will or will not be subject to the operation of the law and thereby, of their own volition, create an exception to the general and uniform system of county government. In other words, the legislature by the act in question attempted to do by indirection that which it could not do directly.

That is to say, having no power to exempt one or more counties from the operation of the act, it could not confer that power upon the people of the different counties. The legislature itself must by its own enactment establish in the first instance a system of county government uniform throughout the state, and it necessarily follows that such system, when once established, must, in so far as its uniformity is concerned, be kept intact by the legislature and must not be impaired by any subsequent legislation authorizing in counties a material difference in the manner of performing functions of government intrusted to them.

[12] Inasmuch as the County Engineer Act provides for a county office, involving the exercise of political functions, we conclude that the said act violates the constitutional requirement that the system of county governments prescribed by the legislature shall be uniform throughout the state, by reason of the fact that it is not mandatory in its operation, but that it is optional with each county whether or not the office provided for by the act shall be established therein. (*Los Angeles County v. Kirk*, 148 Cal. 385, [83 Pac. 250].)

This conclusion is not in conflict with the cases relied upon by respondents. In *Scott v. Boyle*, 164 Cal. 321, [128 Pac. 941], the court had under consideration a statute which authorized the appointment of sealers of weights and measures but left the determination as to whether or not this authorization should be availed of to the different counties and municipalities. The statute dealt with an office which was specifically provided for by a special section of the constitution. (Const., art. XI, sec. 14), and which the court held was "distinct from the general political functions of counties and cities and the general scheme of county or municipal government." Likewise, the statute upheld in the case of *Board of Law Library Trustees v. Board of Supervisors*, 99 Cal. 571, [34 Pac. 244], left to the election of the different counties the matter of the establishment of law libraries, but such institutions are not part of the system of county government, at least in so far as the execution of "political functions" is concerned, and, consequently, the point here presented was not discussed in that case. In *Tulare County v. May*, 118 Cal. 303, [50 Pac. 427], the act provided for one additional deputy sheriff and two deputy

clerks in any county in which an additional judge of the superior court was created by the legislature. This provision was valid, for, as stated in the opinion, it operated in each county alike upon the creation of an additional judge in that county *by the legislature*.

The employment of plaintiff to perform the work in question was ratified by the board of supervisors by allowing his claim for compensation for the work (*Power v. May*, 123 Cal. 147, [55 Pac. 796]), and, in view of the fact that the County Engineer Act must be held unconstitutional, the record discloses no valid objection to the payment of the claim thus allowed. Disregarding the findings concerning the proceedings under the said County Engineer Act, the remaining findings of the trial court are sufficient to support a judgment in plaintiff's favor. Accordingly, the judgment is reversed, with directions to the trial court to grant the relief prayed for in plaintiff's petition.

Sloane, J., Wilbur, J., Angellotti, C. J., and Lawlor, J., concurred.

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[L. A. No. 6222. In Bank.—October 7, 1921.]

EARL J. McCULLY, Executor, etc., Appellant, v. CLIFFORD W. McARTHUR, etc., Respondent.

- [1] APPEAL—CONFLICTING EVIDENCE—FINDINGS.—Where the evidence is sufficient as a matter of law, and presents a substantial conflict, the findings will not be disturbed on appeal.
- [2] DEEDS—DELIVERY—EVIDENCE OF.—The question of delivery of a deed is essentially one of fact and depends upon the intention of the parties to unconditionally transfer the title to the property. No set form of delivery is necessary, and whether a delivery has been effected in a particular case must be determined by the facts and the circumstances, including the conduct of the parties.
- [3] EVIDENCE—CREDIBILITY OF WITNESS.—It is the exclusive function of the trial court to weigh the evidence and determine the credibility of the witnesses.

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2. Delivery of deed as question of law or fact, notes, 16 Am. Dec. 35; 58 Am. Rep. 289; 53 Am. St. Rep. 537; Ann. Cas. 1914D, 108.

- [4] **DEEDS—ACTION TO CANCEL AND QUIET TITLE—FINDINGS.**—In an action for the cancellation of deeds to real property given by plaintiff's testator to the defendant and to quiet title, where the trial court found that on a certain date there was a delivery of the deeds, another finding to the effect that neither the testator nor her estate was the owner of the property at all times is correct, for upon the theory that there was a delivery on the date found, neither the testator nor her estate could have been the owner after that date.
- [5] **ID.—TRANSFER IN CONTEMPLATION OF DEATH—MOTIVE—EVIDENCE.** Although the complaint alleged in such action that the transfer was made in contemplation of death, where the court found that the deeds were delivered during the lifetime of the grantor and that title was in the grantee, the motive of the former—whether she delivered the deeds in contemplation of death—is immaterial, and the finding could not have been prejudicial.
- [6] **ID.—EVIDENCE—PHYSICAL CONDITION OF GRANTOR.**—In such a case evidence of the statement of the doctor to the grantor concerning her physical condition was properly excluded as hearsay, the doctor not being called as a witness.
- [7] **ID.—FEAR OF GRANTEE.**—In such a case the testimony of a witness as to whether or not the grantor was in fear of the grantee was properly excluded, where there was no claim that the deeds were delivered by reason of the grantee's coercion.
- [8] **ID.—EQUITY—RELIEF.**—In such a case, where the complaint asked for a cancellation of the deeds, and the court found that respondent was the owner of the property, the relief granted was clearly embraced within the issues.
- [9] **ID.—MOTION TO DISMISS CROSS-COMPLAINT AND SEPARATE DEFENSE —FAILURE TO OBJECT—WAIVER.**—In such case, where no objection was made by plaintiff to the granting of motions by defendant at the close of the trial to dismiss the cross-complaint and separate defense without prejudice, the question cannot be raised for the first time on appeal.
- [10] **ID.—WITHDRAWAL OF PLEADING.**—The withdrawal by defendant of his pleading admitting title to one-half of the property in appellant, carried with it the corresponding prayer for relief and left only the general prayer of the answer.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.

Earl J. McCully and Robt. T. Linney for Appellant.

John B. Haas and Gilbert F. Wyvell for Respondent.

LAWLOR, J.—This is an appeal by the plaintiff from a judgment in favor of the defendant, in an action for the cancellation of four deeds to real property located in several counties of the state, in which Lulu M. McArthur, the original plaintiff herein, was the grantor, and the defendant the grantee, and to quiet the title to the property. Lulu M. McArthur died prior to the trial of the action and Earl J. McCully, executor of her estate, was substituted as plaintiff.

The facts about which there is no dispute are these: Mrs. McArthur and respondent had resided together in the relation of mother and son for twenty years preceding the execution of the deeds in question. No kinship existed between them and Mrs. McArthur had not adopted respondent. She was sixty years of age and very ill at the time of the transaction. At that time she was living on a ranch at Rivera. Her deposition was taken prior to the trial. She testified therein that she was told by the nurse, Rose Morrison, that she might die before morning. The matter of transferring the property had been under consideration for some time previous to the day on which the deeds were executed, November 3, 1917. On that date respondent brought a notary, Estelle Le Sage, and his attorney, Mrs. Mabel Willebrandt, from Los Angeles to the ranch. Mrs. Willebrandt presented the deeds to Mrs. McArthur, who signed them while propped up in bed. The execution was witnessed by the notary and two other women, Mrs. McArthur declaring she did not desire to have the deeds recorded. It was discovered that Miss Le Sage had not brought her notarial seal along. The deeds were taken to Los Angeles the same day by respondent, Mrs. Willebrandt, and Miss Le Sage, where the seal was affixed, and the deeds given to respondent, who retained them and caused them to be recorded in April of the following year. Between November 3, 1917, and April, 1918, Mrs. McArthur destroyed what she believed at the time were the original deeds, but which proved to be copies. This action was brought on May 2, 1918. The facts which are involved in dispute will sufficiently appear in the summary of the evidence.

The complaint alleged the material facts and prayed for a cancellation of the deeds and that they be declared null and void, be released of public record, and that appellant

be declared the owner of the property. Respondent in his answer denied the allegations of the complaint. As a special defense and by way of cross-complaint he alleged that he was the owner of an undivided one-half interest in the property described in the complaint and prayed that he be adjudged the owner of such interest. In a separate defense he alleged that he "since the third day of November, 1917, held and does now hold the said undivided one-half interest of the said Lulu M. McArthur in trust for said plaintiff." The allegation of the cross-complaint is that appellant was the owner of some interest adverse to respondent, and respondent prayed that appellant be required to set forth the nature of her several claims, and that the title to one-half of the premises be declared to be in respondent. At the conclusion of the trial the court granted respondent's motion to dismiss the cross-complaint and separate defense without prejudice, and gave judgment for the respondent quieting his title to all the property.

The court found "that on the third day of November, 1917, for a sufficient consideration, the said Lulu M. McArthur, . . . of her own free will made, executed, and delivered to the defendant, . . . four grant deeds, deeding in fee simple the above-described property to the said defendant, . . . and that the title and fee in and to said property now stands in the name of Clifford W. McArthur; that all denials and allegations in defendant's answer are true."

1. Appellant contends that "The evidence in this case is clear and uncontradicted, that there was no valid delivery of the deeds," that "the judgment given was in excess of that demanded in the answer, and this in itself requires a reversal," that the "court in our opinion, committed several errors in its rulings on the admission of testimony," and that other findings besides those on the subject of delivery of the deeds are not supported by the evidence.

[1] In answer to this contention respondent correctly states the rule and cites authorities to the effect that where the evidence is sufficient as a matter of law, and presents a substantial conflict, the findings will not be disturbed on appeal. He also claims that from the testimony of appellant's own witnesses it might properly be contended that there is a sufficient conflict to justify an affirmance of the judgment.



As appellant asserts, "The defendant makes no claim that there was a delivery of the deeds at any other or subsequent time" than November 3, 1917, the day of their execution, and at the trial respondent's attorney expressly stated that no claim was made of a subsequent delivery. It therefore must be shown that a delivery was made on November 3, 1917.

[2] The question of delivery is essentially one of fact and depends upon the intention of the parties to transfer the title to the property unconditionally. No set form of delivery is necessary, and whether a delivery has been effected in a particular case must be determined by the facts and the circumstances, including the conduct of the parties. In 2 Tiffany on Real Property, second edition, section 461, page 1738, it is said: "While, as before stated, the necessity of delivery in connection with the instruments last named [deeds and contracts under seal], and others of an analogous character, is still fully recognized, the crude conception of a manual transfer of the instrument as the only means of making it legally effective, which gave birth to the expression 'delivery' as used in this connection, has been superseded by the more enlightened view that whether an instrument has been delivered is a question of intention merely, there being a sufficient delivery if an intention appears that it shall be legally operative, however this intention may be indicated. . . . Such a transfer to a third person, if not made with the intention that the instrument shall be legally operative, does not constitute a delivery; nor does a transfer to the grantee himself, if the transfer is not with such intention, but is for another purpose as, for instance, to enable him to examine the instrument."

In *Follmer v. Rohrer*, 158 Cal. 755, [112 Pac. 544], it is declared: "'A valid delivery is accomplished when the conduct and acts of a grantor manifest a present intent to dispose of the title conveyed by the deed. No particular form of delivery is necessary; but any act or thing which manifests such an intent is sufficient to establish it. It is always a question of fact, and must be determined by the circumstances surrounding each transaction.' (*Kenniff v. Caulfield*, 140 Cal. 34, 40, [73 Pac. 803], citing other cases.) Manual tradition of the instrument is not enough; the transfer of possession must be with the intent of presently passing

title, and must not be hampered by the reservation of any right of revocation or recall." "It is settled that delivery is not complete until the grantor has voluntarily surrendered all control over it." (*Drinkwater v. Hollar*, 6 Cal. App. 117, [91 Pac. 664].) "The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another." (*Moore v. Trott*, 162 Cal. 268, [122 Pac. 462]. See, also, *Williams v. Kidd*, 170 Cal. 631, [Ann. Cas. 1916E, 703, 151 Pac. 1]; *Stone v. Daily*, 181 Cal. 571, [185 Pac. 665].)

Considerable evidence was admitted on the issue of delivery. Respondent on cross-examination testified that "When the matter of making these deeds came up, I discussed that with her several weeks before." Nellie Allen Bell, a witness for appellant, testified that she "heard defendant say to Mrs. McArthur before the papers were signed, 'Well, Mother, we are ready to sign those papers,' and Mrs. McArthur said, 'All right, I suppose it is the thing to do.' " Respondent testified: "The signing took place in Mrs. McArthur's room; she was in bed at the time; I think Miss Willebrandt handed those deeds to Mrs. McArthur; and in detail Miss Willebrandt explained these deeds to her, when she handed them to her; those deeds were prepared under the request of Mrs. Lulu M. McArthur; the request was made to me, and the deeds were prepared by me and under my immediate direction; these deeds were handed to her one at a time, when they were signed; when she took the deeds she asked a number of questions about the deeds, and Miss Willebrandt explained each deed to her in detail." He also testified that "She signed each deed separately, and handed it to me"; that Mrs. McArthur said, "'I would like to have her [Mrs. McArthur's sister] sign as a witness,' so that there was no chance thereafter to make any trouble over the deeds." Estelle Le Sage testified: "Mrs. McArthur spoke to Mrs. Willebrandt about the deeds, and I said that I had to take them up and put the seal on them; she seemed to be very disappointed and she said, 'Well, I wanted everything done up this afternoon'; she said, 'I wanted it all done right now'; . . . yes, she said she wanted—very anxious to see them, to see that everything was fin-

ished up on them; she was disappointed because I didn't bring my seal; . . . she said she wanted him' to have all the property, but there was one that she wanted to hold for a while." Respondent further testified: "I put the deeds that night in my desk, in my room; Mrs. McArthur had access to my desk; they remained in the desk from November 3d until I brought them in and put them in the safety deposit box; I think it was several weeks afterward, I don't remember just exactly the date; I had the box in the Hellman Bank; why, Mrs. McArthur never demanded of me either the original deeds, during the time the deeds were on the ranch there; she never asked me for the deeds until a very considerable time, months afterward, and I don't remember of her ever making a demand for the deeds; I can't—I would not say positively that she didn't—but I can't recollect of her having asked me for the deeds until the friction started months and months afterward," and that she "tried to get me to record them at the time they were first made out"; that "when she handed the deeds to me, she said she wanted the property to stand in my title; she said she wanted it to go to me. She said that I had been instrumental in making all the property. It was understood between us that whichever one should pass out first, the other should get the property." We quote further: "The Court: What occurred at the bank the day you and Mrs. McArthur went there to get the deeds? A. The day Mrs. McArthur and I went? The Court: Yes. A. I never went to the bank with her to get the deeds. The Court: When and where did you deliver her the copies? A. I didn't deliver them; they were in the bank; I didn't know they were taken for—or a long time afterward, I don't remember just how long." Mrs. Willebrandt testified: "Miss Le Sage placed the seal on the deeds, and handed them to Mr. McArthur, saying, 'Well, they are finished, that is your mother's wish.' . . . I don't think I mentioned about mailing the deeds to her. I don't think I stated that night that I would return the deeds to her to-morrow, after the notarial seal was put on. I didn't understand that she wanted them returned to her. I understood that she wanted it finished; didn't want them in the hands of the notary."

It is appellant's contention that the evidence clearly shows there was no delivery of the deeds. The testimony of his

witnesses is set forth, and asserted inconsistencies in the testimony of respondent are pointed out. Appellant also contends that the testimony of respondent is not to be credited; that respondent was anxious to secure the property; that he had "had some words" with deceased at the time she asked him for the deeds; and that these facts make his testimony untrustworthy. He lays stress on the testimony of Mrs. McArthur—"I told her [Mrs. Willebrandt] I wanted the deeds returned to me by mail and to remember that if I did not die that night I did not wish them delivered," and that Mrs. Willebrandt told her that she would return the deeds; on that of Mrs. Nellie Allen Bell, Mrs. Lottie Foster, and Estelle Le Sage, who testified that Mrs. McArthur requested Mrs. Willebrandt to return the deeds; on Mrs. Foster's further testimony that "She [Mrs. McArthur] said there should not be a delivery of the deeds; I don't think she said anything further about that delivery; she said to the lady lawyer that they were not to be delivered," that Mrs. McArthur "wanted them back by mail and offered to pay the postage," and that "She said, 'The deeds are not to be delivered now.' " Appellant refers to the testimony of Estelle Le Sage that Mrs. McArthur said: "I don't want them recorded." He claims the testimony of respondent corroborates that of appellant's witnesses in many respects, that respondent testified Mrs. McArthur said she wanted the deeds back, and that she made the request of Mrs. Willebrandt that they be mailed to the ranch. Appellant points to the happenings subsequent to the signing of the deeds and says: "It appears from the testimony of other witnesses which need not be reviewed in detail, that after the defendant had confessed to Mrs. McArthur that he had the deeds, she obtained from him what he led her to believe were the deeds that she signed; that in the presence of her friend, Alta I. Hitchcock, and Miss Prince, in charge of the safety deposit vault, she destroyed the deeds; that these deeds were in fact merely copies; that McArthur had kept the original deeds and afterward recorded them. From the foregoing review it appears that the testimony that Mrs. McArthur *did not intend to deliver the deeds, or have them delivered to the grantee—the defendant, by any other person, is absolutely uncontradicted.*"

Because of the state of the evidence on the question whether Mrs. McArthur intended to and did deliver the deeds, and the apparent force of appellant's contention that the evidence fails to establish a delivery, we have deemed it proper to set it out at some length. It is strongly urged by appellant that inasmuch as the evidence shows that Mrs. McArthur did not want the deeds recorded, but did want them returned to her after the notarial seal was affixed, and that she attempted to obtain the deeds from respondent, but that he deceived her by retaining the originals and giving her copies—thereby evidencing his recognition of her right to the deeds—it is clear she did not intend to deliver them, and that therefore the findings cannot be sustained.

[3] It is the exclusive function of the trial court to weigh the evidence and determine the credibility of the witnesses. Keeping this rule in view, it must be held under the evidence that we are bound by the findings of delivery. There is evidence that Mrs. McArthur handed the deeds to respondent and said she wanted the property to stand "in his title"; that she asked her sister to witness the conveyance that there might be no trouble over them, that she said she wanted the transfer completed at that time, and that later she requested respondent to have the deeds recorded. The evidence of the relationship and friendly feeling existing between Mrs. McArthur and respondent at the time of the making out and signing of the deeds, and that it was understood between them that one or the other should eventually get the property, may have been regarded as significant by the court in finding for respondent. The evidence that Mrs. McArthur did not wish the deeds recorded at the time they were delivered is not, of itself, necessarily inconsistent with a delivery. The court may have concluded from the evidence that the reason Mrs. McArthur did not desire the deeds recorded was because she did not wish respondent to trade one of the pieces of property at that time. Nor is the evidence that she later attempted to recover the deeds necessarily conclusive of nondelivery, for the court may have decided that she changed her mind concerning the transfer when the "friction" developed between them. As the evidence relied upon by appellant is in greater or less degree involved in conflict, and the testimony of respondent alone, if accepted, is sufficient to sustain a finding of de-

livery, it cannot be held that the trial court could not have found from the evidence that Mrs. McArthur intended to and did deliver the deeds.

2. Appellant contends that certain findings other than those of delivery are not supported by the evidence. Finding II, which is to the effect that neither Mrs. McArthur nor her estate was the owner of the property at all times, is one of these. [4] Manifestly, this finding is correct, for upon the theory that there was a delivery on November 3, 1917, neither she nor her estate could have been the owner after that date.

The other findings complained of are to the effect that it is not true the deeds were without consideration, that it is not true they were made in contemplation of death, that it is not true that Mrs. McArthur instructed Mrs. Willebrandt to return the deeds if she did not die, that it is true respondent had the deeds on November 8th, that it is true they were returned to him by Mrs. Willebrandt, but not for the purpose of returning them to Mrs. McArthur, that it is not true respondent on November 8th said the deeds were in the safe deposit box in Los Angeles, and that it is not true that on November 8th, or at any other time, respondent went with Mrs. McArthur to the safe deposit box and there delivered the deeds to her, and that she then placed them in her private safe deposit box. These findings are on the issues presented by the pleadings. As we have shown, the finding on delivery is to the effect that for a sufficient consideration Mrs. McArthur of her own free will executed and delivered the deeds. *Lieman v. Golly*, 178 Cal. 544, [174 Pac. 33], was an action to set aside deeds for a lack of consideration. The court said: "In his brief the appellant claims that the finding of the consideration is insufficient. The ninth finding states that each of said deeds 'was executed for a good consideration passing from defendant to said Annie M. Golly.' No further finding was necessary. On the contrary, since the findings also show that the deeds were executed voluntarily and with knowledge of their contents and the intent to convey, no consideration was necessary to support the deeds as valid conveyances of the land. (Civ. Code, sec. 1040.)" [5] It is true the complaint alleged the transfer was made in contemplation of death, but in view of the finding that the deeds were delivered during

the lifetime of Mrs. McArthur and that title was found to be in respondent, her motive—whether she delivered the deeds in contemplation of death—is immaterial and the finding could not have been prejudicial. As to the remaining findings, Mrs. Willebrandt testified she gave the deeds to respondent, that she did not understand Mrs. McArthur wanted them returned to her, and respondent testified he told Mrs. McArthur, a short while after the deeds were signed, that he had them in his desk at the ranch. The finding that respondent did not return the deeds to Mrs. McArthur is supported by the evidence, for it is not disputed she secured only the copies. The finding that Mrs. McArthur, on or about November 27th, learned for the first time that the copies of the deeds which she destroyed were not the originals is immaterial, for it having been found there was a delivery on November 3d, whether she later learned that copies and not originals had been given to her, becomes unimportant.

[6] 3. There was no error in excluding the testimony concerning Mrs. McArthur's physical condition. Her testimony to the effect that she thought she was critically ill was admitted, and the statement of the doctor to her concerning her condition, since the doctor was not called as a witness, was hearsay. [7] The testimony of Mrs. Foster, as to whether or not Mrs. McArthur was in fear of respondent, was properly excluded, for there was no claim that the deeds were delivered by reason of respondent's coercion. The testimony of Mrs. McCandless concerning the destruction of the deeds was properly rejected because the questions had already been asked and answered.

4. Appellant's contention that the judgment must be reversed for the reason that it exceeds the relief prayed for, in that in the separate defense and in the cross-complaint the respondent had alleged himself to be the owner of a one-half interest in the property and asked to be adjudged such owner, cannot be sustained. In *Zellerbach v. Allenberg*, 99 Cal. 57, [33 Pac. 786] it was contended the judgment was not authorized because it granted the defendant affirmative relief when no such relief was prayed for. The court said: "There was no error in the action of the court complained of. The case was one in equity, and the court was authorized to grant any relief consistent with the case made



and embraced within the issues, although not specifically prayed for." [8] In this case the relief granted was clearly embraced within the issues, for the complaint asked a cancellation of the deeds, and the court found that respondent was the owner of the property. Appellant argues further that the question presented here "is the effect in an answer of allegations the only effect of which, when the pleading is taken as a whole, is that of a disclaimer and admission against interest as to a part of the subject matter of the action." In *Billings v. Drew*, 52 Cal. 565, it was declared: "They had the right to set up negative as well as affirmative defenses to the action, and the affirmative matter, separately pleaded, did not operate as a waiver or withdrawal of the denials contained in other portions of the answer." In *Nudd v. Thompson*, 34 Cal. 39, a case involving a motion for judgment on the pleadings, it was said: "We had occasion to consider that question in *Siter v. Jewett*, 33 Cal. 92, and we held that 'where there are several answers, an admission made in one is not available in proof of issues raised by the others.' " In *Meyers v. Merillon*, 118 Cal. 352, [50 Pac. 662], the court declared: "As in separate defenses a denial in one is not waived by an admission of the same matter in another (*Billings v. Drew*, 52 Cal. 565; *Miles v. Woodward*, 115 Cal. 308, [46 Pac. 1076]), so here the denial of the answer is not waived or overcome by an averment in the cross-complaint of substantially the same facts as those which the answer denies." It follows that respondent is not bound by the averments in the special defense and cross-complaint, and that the relief need not be limited to that prayed for. In *Southern Pac. R. R. Co. v. Dufour*, 95 Cal. 615, [19 L. R. A. 92, 30 Pac. 783], it was stated: "At the close of defendant's case he withdrew his special defense, and this action of counsel is assigned as error. Upon an examination of the record we find no objection or exception taken to the withdrawal of this special defense from the answer, and hence do not perceive how it can be a proper subject for review. If plaintiff, relying on the allegations of the defense to cure a defective complaint, was surprised and misled by such action of counsel, upon a proper showing he would have been entitled to a continuance in order that he might amend his complaint or procure additional evidence, but there is nothing to indicate that he applied for

such relief.” The question presented here is similar to the one in that case, with the additional fact that respondent moved also to dismiss the cross-complaint. [9] No objection was made by counsel for appellant to the granting of these motions, so the question may not be raised for the first time on appeal.

[10] It follows that respondent’s withdrawal of these pleadings, which admitted title to one-half of the property to be in appellant, carried with it the corresponding prayer for relief, and left only the general prayer of the answer, which was “for such other and further relief as to the court may seem meet and proper in the premises.”

5. It having been decided that the findings of delivery, as well as those on other material issues presented by the pleadings, were supported by the evidence, and that appellant’s objections to the admission of testimony and to respondent’s withdrawal of certain of his pleadings were without merit, it becomes unnecessary to consider respondent’s contention that the bill of exceptions, which contains the entire record on appeal, not having been filed and served within the statutory period, and that the application for relief from such failure under section 473 of the Code of Civil Procedure having been fatally defective, appellant is not entitled to a review of the evidence.

Judgment affirmed.

Wilbur, J., Shurtleff, J., Sloane, J., Lennon, J., and Angellotti, C. J., concurred.

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[S. F. No. 9414. In Bank.—October 10, 1921.]

MERVYN GOLDSTEIN, by His Guardian, etc., Appellant,  
v. W. HEALY, Respondent.

[1] PLEADING—DEMURRER—ADMISSIONS.—While it is well settled that a demurrer admits the truth of all facts that are well pleaded in the complaint, it does not confess any omitted circumstance which is indispensable to the cause of action upon which it is based, or essential to remedy an allegation specially challenged for uncertainty or ambiguity.

[2] ID.—ESSENTIALS OF COMPLAINT.—All that is required of a plaintiff, even as against a special demurrer, is that he set forth in

his complaint the essential facts of his case with reasonable precision, and with particularity sufficiently specific to acquaint the defendant of the nature, source, and extent of his cause of action.

- [3] **INNKEEPERS—GUESTS—DEFINITION.**—A guest of an inn or hotel may be defined as one who receives accommodations or entertainment therein, usually for compensation.
- [4] **ID.—GUESTS — HOTELS — RIGHT TO INVITE PERSONS TO.**—In the absence of a regulation or agreement to the contrary, a guest of a hotel may, as a matter of right, under such reasonable restrictions and regulations as the manager may impose, invite unobjectionable persons to visit him at the inn for lawful purposes and at proper times.
- [5] **ID.—RIGHTS OF INVITEES.**—To all such invitees, the innkeeper owes the duty of at all times maintaining his hotel premises in a reasonably safe condition, and of exercising reasonable care to protect them while in the hotel and in the part thereof open to the public from personal injury through his negligence; but this duty does not obtain in cases where the injury to the invitee was due to a patent defect, or structural insecurity in the hotel premises or its equipment.
- [6] **ID.—ACTION FOR DAMAGES — INJURY TO INVITEE OF GUEST OF HOTEL—PLEADINGS—SUFFICIENCY OF COMPLAINT.**—In an action by the invitee of a guest of a hotel for personal injuries received by him, alleged to have been caused by the giving away of a railing on a platform whereby he was precipitated to the ground, an allegation that the decayed condition of the railing was “unknown” to plaintiff was in effect a sufficient declaration that it was latent.
- [7] **ID.—FAILURE TO EXERCISE CARE—DEFENSE.**—If the defective condition of the railing in such a case was such that it would have been discovered by plaintiff in the exercise of ordinary care, the failure to exercise such care would be a defense which the plaintiff is not required to anticipate.
- [8] **PLEADING—PARTICULARITY REQUIRED—MATTERS IN KNOWLEDGE OF DEFENDANT.**—Less particularity is required in the allegations of the complaint where the facts in it stated are such that the defendant, from their nature and his relation to them, has full information concerning them.
- [9] **ID.—SUFFICIENCY OF COMPLAINT.**—In such a case the causal connection between the negligence and the injury are sufficiently shown in the complaint by the allegations, “that while on said platform . . . and while standing on said platform and talking

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5. Liability of innkeeper for personal injury to guest from condition of the premises, notes, 15 *Ann. Cas.* 925; *Ann. Cas.* 1912A, 1210; 43 *L. R. A. (N. S.)* 657.

to the said guest of defendants and with his back to said railing . . . , and relying upon said railing as aforesaid as protection against falling over and off of the said platform, the said plaintiff rested his hands lightly upon the said railing as aforesaid, and thereupon and by reason of the said rottenness and decomposition of the said wood of which the said railing consisted as aforesaid, and by reason of the carelessness and negligence of the defendants in so maintaining said railing, and not otherwise, the said railing gave way and broke, thereby precipitating and causing the plaintiff to fall off the said platform and to the ground below"; and such allegations are good as against both a general and special demurrer.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmett Seawell, Judge. Reversed.

The facts are stated in the opinion of the court.

Hiram E. Casey, Casey & Lambert and T. L. Breslauer for Appellant.

J. R. Leppo for Respondent.

SHURTLEFF, J.—Plaintiff in his second amended complaint alleged that at the time of the commencement of the action he was a minor under the age of twenty-one years, and that Ben Goldstein was the duly appointed, qualified, and acting guardian of his person and estate; "that on or about the fifth day of July, 1919, the defendants [there being one fictitious defendant] . . . were conducting and maintaining at Monte Rio, in the county of Sonoma, state of California, a summer resort and hotel for the accommodation of the public. . . . That as a part of the said summer resort and hotel and as living quarters for its guests and their invitees the defendants maintained a tent set upon a wooden platform." That to prevent persons occupying, visiting, or being upon said platform from falling therefrom, and to protect persons who were thereon, the defendants erected, placed, and maintained on the outer edge thereof, "a railing made of wood about three inches to four inches in diameter," which railing was "fastened upon the said platform about three or four feet above the floor of the said platform by means of timbers and braces." That said railing at all the times in the amended complaint mentioned,

“consisted of decomposed and rotten wood . . . negligently and carelessly maintained in said condition by the said defendants, all of which was unknown to the said plaintiff. . . . That on or about the fifth day of July, 1919, the plaintiff herein was present upon the said platform at the invitation and request of a guest of the said hotel and summer resort, to whom the tent on the said platform had been assigned by the said defendants as living quarters; and that while on said platform as aforesaid and while standing on said platform talking to the said guest of defendants and with his back to said railing around the said platform as hereinbefore described, and relying upon said railing as aforesaid as protection against falling over and off from the said platform the said plaintiff rested his hands lightly upon the said railing as aforesaid, and thereupon and by reason of the said rottenness and decomposition of the said wood of which the said railing consisted as aforesaid, and by reason of the carelessness and negligence of the defendants in so maintaining said railing, and not otherwise, the said railing gave way and broke, thereby precipitating and causing the plaintiff to fall off the said platform and to the ground below, a distance of about twenty feet and causing the plaintiff to strike upon his head and body.” It is further alleged that plaintiff, by reason of his alleged fall, sustained certain enumerated physical injuries, incurred numerous specified expenses, and lost one month’s salary. The prayer of the complaint is for five thousand dollars damages.

As we have said, there was one fictitious defendant who was never served, and for that reason, following the briefs, we will hereafter use the singular number.

The foregoing is a comprehensive statement of the allegations of the amended complaint which are material to this inquiry. To this complaint defendant, Healy, demurred generally upon the ground that it failed to state a cause of action, and specially that it was ambiguous and uncertain in that it was not alleged therein, and could not be ascertained therefrom, whether the decomposed and rotten condition of the railing “was apparent and patent, or concealed and latent”; “what caused said railing to give way and break”; “for what purpose was plaintiff present on said platform,” or at whose invitation; what caused plaintiff

to fall from the platform, or to fall upon or against the railing, or how "the giving way and breaking of the railing caused plaintiff to fall."

The demurrer was sustained without leave to amend, and judgment entered in favor of defendant for costs. It is from this judgment that this appeal is prosecuted.

[1] While it is well settled that a demurrer admits the truth of all facts that are well pleaded in the complaint, it does not, however, confess any omitted circumstance which is indispensable to the cause of action upon which it is based, or essential to remedy an allegation specially challenged for uncertainty or ambiguity. [2] All that is required of a plaintiff, even as against a special demurrer, is that he set forth in his complaint the essential facts of his case with reasonable precision and with particularity sufficiently specific to acquaint the defendant of the nature, source, and extent of his cause of action.

A few general observations touching the relations of the parties and their corresponding duties and liabilities, as disclosed by the amended complaint, will conduce to a clearer understanding of the questions to be determined.

[3] A guest of an inn or hotel may be defined as one who receives accommodations or entertainment therein, usually for compensation. (*Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, [26 Am. St. Rep. 325, 6 L. R. A. 809, 44 N. W. 226]; *Manning v. Wells*, 28 Tenn. 746, [51 Am. Dec. 688]; Schouler's *Bailments and Carriers*, 3d ed., 282.) While this definition seems simple of application, it is, nevertheless, not always easy to determine whether the person claiming such relation is in fact a guest within its meaning, but no such difficulty arises here, for it is clear from the complaint that plaintiff was not upon the hotel property of defendant in that capacity. The allegation of the complaint is that plaintiff was upon the platform, from which he fell, "at the invitation and request of a guest of the said hotel." Plaintiff makes no claim whatever in his pleading that he in any manner, as a guest, availed himself of the accommodations which the hotel afforded. [4] He states he was at the defendant's inn in response to an invitation of a guest, who, we hold, in extending such invitation, was clearly acting within his rights, for, in the absence of a regulation or agreement to the contrary, a guest of a hotel may, as a

matter of right, under such reasonable restrictions and regulations as the management may impose, invite unobjectionable persons to visit him at the inn for lawful purposes and at proper times. It is common knowledge that this right is universally accorded guests of hotels, and that it is a necessary public convenience. It is more than a privilege; it is, as we have said, a right which cannot be withheld except for good cause, as long as the relation of innkeeper and guest continues; it is one of the accommodations of the service which a hotel gives its patrons. [5] To all such invitees, and such was the status of plaintiff, the innkeeper owes the duty of at all times maintaining his hotel premises in a reasonably safe condition, and of exercising reasonable care to protect them while in the hotel and in the part thereof open to the public, from personal injury through his negligence. But this duty does not obtain in cases where the injury to the invitee was due to a patent defect, or structural insecurity in the hotel premises or its equipment, so that, in the instant case, if the alleged "rotten and decomposed" condition of the railing was patent, the plaintiff cannot recover. As said by Hawley, District Judge, in *Ten Broeck v. Wells Fargo & Co. et al.*, 47 Fed. 690, which was an action for damages for injuries received by a fall from steps leading to a platform connected with a hotel and not protected by a railing: "In this case no presumption need be indulged in. The pleader has not only shown by his allegation that the injury was not received because 'anything gave way through the latent insecurity of the structure,' which was the ground upon which plaintiff might be entitled to recover, but has gone further, and affirmatively shown 'that the accident arose from a patent defect,' for which, under the well-settled principles of law, plaintiff is not entitled to recover."

[6] It is to the last stated principle of law that defendant appeals in support of his contention that the complaint under review is uncertain and ambiguous in that it cannot be ascertained therefrom whether the decomposed condition of the railing was "latent or patent." But we do not think the pleading is open to this criticism; upon the contrary, in our opinion, the allegation that the decayed condition of the railing was "unknown" to plaintiff, which could not have been true had it been patent, is in effect a sufficient declaration that it was latent. [7] If the defective condi-



tion of the railing was such that it would have been discovered by plaintiff in the exercise of ordinary care, the failure to exercise such care would be a defense which the plaintiff is not required to anticipate. It also sufficiently appears from the complaint that the plaintiff was upon the platform, from which he fell, at the invitation of the guest occupying the same, from which it follows *prima facie* that he was lawfully and properly there. If the reverse is true, it is likewise a matter of defense. Nor was it necessary for the plaintiff to state the name of the guest whom he was visiting; his omission to do so, under the peculiar facts of this case, does not render the complaint ambiguous or uncertain. It refers to but one tent as being upon the hotel premises, and describes it with sufficient particularity to render it easy of identification. Moreover, so far as the pleading discloses, but one person occupied such tent, and such occupant was the guest at whose request the plaintiff was upon the platform. This being the state of the pleadings, it was an easy matter for the defendant to ascertain the name of such guest who presumably registered and was assigned to the tent in question. [8] Less particularity is required in the allegations of a complaint where, as here, the facts in it stated are such that the defendant, from their nature and his relation to them, has full information concerning them.

Respondent makes the further claim that the complaint is insufficient in that it does not show the "causal connection between the negligence and the injury." With this contention we find ourselves unable to agree. [9] In our opinion the following allegations amply comply with this elementary rule of pleading: "that while on said platform . . . and while standing on said platform talking to the said guest of defendants and with his back to said railing . . . , and relying upon said railing as aforesaid as protection against falling over and off from the said platform the said plaintiff rested his hands lightly upon the said railing as aforesaid, and thereupon and by reason of the said rottenness and decomposition of the said wood of which the said railing consisted as aforesaid, and by reason of the carelessness and negligence of the defendants in so maintaining said railing, and not otherwise, the said railing gave way and broke, thereby precipitating and causing the plaintiff to fall off the said platform and to the ground below."

The quoted allegations are sufficiently comprehensive, and adequately disclose the "causal connection between the injury and the negligence," which the law demands must be present to justify a recovery in cases similar to the one under consideration, and are hence good as against both the general and special demurrer.

None of the cases, to which counsel for respondent directs our attention as bearing upon this branch of the case, in any manner conflict with the views herein expressed. Each of them was in the main disposed of upon the facts which it presented, which facts were not in all respects analogous to the facts of the present one. *Smith v. Buttner*, 90 Cal. 99, [27 Pac. 29], contains language which, when read apart from the facts, seems to support defendant's contention. The complaint in that case declared that the plaintiffs were tenants in possession of, and occupying, a dwelling-house, while it was being raised, and that the defendants, who were the lessors, had failed to provide any safe and proper means of entrance to, or egress from, the same, which, if true, would be patent to anyone. The court there said: "As we have seen, it is entirely consistent with the allegations of this complaint to suppose the injury occurred because defendant neglected to provide any mode of egress whatever. We are not at liberty to suppose anything gave way through the latent insecurity of the structure; for it is not so alleged." It will be seen at a glance that this case is distinguishable from the one we are considering, for here it appears that the defendant had in fact constructed a railing around the platform, which railing, when plaintiff placed his hands upon it, gave way by reason of a defect which, as we have pointed out, the complaint alleges in effect was latent.

For the foregoing reasons we think the learned judge of the trial court erred in sustaining the defendant's demurrer.

The judgment is reversed and the lower court directed to overrule the demurrer and permit the defendant to answer the complaint within such time as it may deem reasonable.

Sloane, J., Angellotti, C. J., Wilbur, J., Lennon, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred.

[Crim. No. 2349. In Bank.—October 11, 1921.]

THE PEOPLE, Appellant, v. ROY R. LAUMAN, Respondent.

- [1] **CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT—DEFINITION.**—A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, and it may be founded on any of the defects in the indictment or information mentioned in section 1004 of the Penal Code, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced.
- [2] **ID.—DEMURRER TO INDICTMENT—GROUNDS OF.**—The defendant may demur to an indictment when it appears upon the face thereof either that it does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code, or that the facts stated do not constitute a public offense.
- [3] **ID.—FORM OF INDICTMENT.**—An indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and it must be direct and certain, as regards the offense charged and the particular circumstances of the offense charged, when they are necessary to constitute a complete offense.
- [4] **ID.—OBJECTIONS TO INDICTMENT—HOW TAKEN.**—When the objections mentioned in section 1004 of the Penal Code appear on the face of an indictment, they can only be taken by demurrer, except that the objection that the facts stated do not constitute a public offense may be taken after the trial, in arrest of judgment.
- [5] **ID.—SUFFICIENCY OF INDICTMENT.**—In a prosecution for presenting a false proof in support of a claim upon a policy of insurance, under section 549 of the Penal Code, where the indictment alleged that the insurance company was organized and doing an insurance business on a certain date, that defendant procured a policy of insurance, and that, intending to cheat the said company, he presented false claims of proof of loss to it, the proof of loss being set out in the indictment, the indictment was sufficient although there was no allegation, in terms, that the proofs of loss were presented on contracts of insurance for the payment of a loss, and there was no allegation that the company whose existence was alleged issued the policies.
- [6] **ID.—JUDGMENTS — OMISSIONS — WHEN NOT PREJUDICIAL.**—Under section 960 of the Penal Code no indictment is insufficient, nor can

the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits; and under section 1404, neither a departure from the form or mode prescribed by the Penal Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant or tended to his prejudice, in respect to a substantial right.

- [7] ID.—FAILURE TO ALLEGE CONTRACT IN FORCE—IMMATERIALITY OF. In such a case the indictment is not defective in not alleging that the contract of insurance was in force at the time the proof of loss was presented.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge. Reversed.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, Arthur Keetch, Deputy Attorney-General, Thomas A. Wood, Thomas Lee Woolwine, District Attorney, and W. J. Clark, Deputy District Attorney, for Appellant.

Chandler P. Ward, Samuel R. Blake and Davis, Rush & MacDonald for Respondent.

LAWLOR, J.—This is an appeal by the people from an order granting a motion in arrest of judgment. Respondent was charged in each of three counts of an indictment with the crime of presenting false proofs in support of a claim upon a policy of insurance, as defined by section 549 of the Penal Code. He had taken out three policies of fire insurance, one each in the Springfield Fire and Marine Insurance Company, the Providence-Washington Insurance Company, and the Concordia Fire Insurance Company. The respondent was engaged in the cleaning and dyeing business in the city of Los Angeles, operating under the name of the Imperial Dye Works. The policies covered the building, stock in trade, and other goods connected with the business, and also articles left with respondent by his customers. Two fires occurred on the premises, the first on June 5, 1917, and the second on July 14, 1917. Respondent filed claims

and proofs of loss with each of the three companies, and these are the proofs alleged to have been falsely made.

The indictment alleged the existence of the three insurance companies, the procuring of policies of insurance, not alleging they were procured in the above companies, the occurring of the fires, the presentation of the proofs of loss to the said companies, the falsity of the proofs, and respondent's knowledge thereof and intent to cheat and defraud the said companies. Each count charged the presentation of false proofs to one of the companies. A general demurrer was interposed to each count, and was disallowed. A trial of the three counts was had, and the jury returned a verdict of guilty on each count. Respondent interposed a motion for a new trial and a motion in arrest of judgment. The motion for a new trial was denied, no appeal being taken from the order. The motion in arrest of judgment was granted, and from the said order this appeal is taken.

[1] A motion in arrest of judgment is defined in section 1185 of the Penal Code as an "application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant, . . . It may be founded on any of the defects in the indictment or information mentioned in section ten hundred and four, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced." [2] Section 1004 of the Penal Code, as far as it is pertinent here, provides that "The defendant may demur to the indictment . . . when it appears upon the face thereof either . . . 2. That it does not substantially conform to the requirements of sections nine hundred and fifty, nine hundred and fifty-one, and nine hundred and fifty-two; . . . 4. That the facts stated do not constitute a public offense." [3] By section 950 of the Penal Code the indictment must contain "2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Section 951 prescribes the form of the indictment, and section 952 requires that "it must be direct and certain, as it regards . . . 2. The offense charged; 3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense." [4] Section 1012 provides in part: "When

the objections mentioned in section one thousand and four appear on the face of the indictment . . . they can only be taken by demurrer, except that the objection . . . that the facts stated do not constitute a public offense, may be taken . . . after the trial, in arrest of judgment."

The demurrer specifies two grounds—that neither the indictment nor any count thereof states facts sufficient to constitute a public offense, and that neither the indictment nor any count thereof substantially conforms to the requirements of sections 950, 951 and 952 of the Penal Code. The motion in arrest of judgment specifies all the grounds mentioned in said section 1004, but on appeal respondent only urges that no count of the indictment alleges facts sufficient to constitute a public offense.

We quote from respondent's opening brief: "The indictment in this case, and each of the counts contained therein, is fatally defective in alleging merely that the defendant presented 'a false and fraudulent claim of loss by fire.' There is no allegation that a claim was presented upon a contract of insurance for the payment of a loss." In his supplemental brief it is contended that "Each count of the indictment wholly fails to allege that the contract of insurance which it is alleged Lauman obtained on a certain date *was issued* either by the company whose corporate existence is alleged or by the company to which it is alleged Lauman presented a proof of loss," and that "It is absolutely essential to the stating of a public offense under such section that the indictment charge not only that, at the time of the fire, but at the time of the making and presenting of the proof of loss, there was a valid contract of insurance, then in full force and effect. As stated before, there is no allegation that any contract of insurance or otherwise was existing . . . at the time of its execution or presentation."

[5] The different counts of the indictment are all worded alike, except for the difference in the identity of the insurance companies, the items covered and the terms of the policies. For brevity, we shall discuss the first count only. Considering the contention that there is no allegation that the proofs of loss were presented on contracts of insurance for the payment of a loss, and that there is no allegation that the companies whose existence was alleged issued the

policies, it is true the indictment does not, in terms, allege these facts. Section 959 of the Penal Code provides that the indictment is sufficient if "the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." The indictment in this case did allege that the Springfield company was organized and doing an insurance business on July 3, 1917; that respondent procured a policy of insurance, and that, intending to cheat the said company, he presented false claims of proof of loss to it. This proof of loss, which is set out in the indictment, is as follows: "Policy No. 424612, Agency at Los Angeles, Cal. Amount of policy, \$2500.00. Expiration July 3, 1918. Sworn statement in proof of loss to the Springfield . . . Co. . . . By your policy as above, you insured Roy Lauman, trading as Imperial Dye Works, according to the terms and conditions printed therein," and at the end of the proof: "Total amount claimed of this company under above named policy, \$2,011.97."

There are allegations, then, that the company was engaged in the insurance business at the time in question, and that a proof of loss was presented to it on a policy bearing a given number and issued to respondent, which proof of loss described the same character of property as that referred to in other portions of the indictment. It is incomprehensible to us how a person of common understanding could fail to be informed by the indictment that respondent was charged with anything different than presenting to the Springfield company a false claim of loss suffered by fire, upon a policy issued by it to him to cover property so falsely claimed to have been destroyed. The conclusion is irresistible that to a common understanding it would appear that the indictment was intended to charge that the Springfield company had issued a policy to respondent and that the claim of loss based thereon was upon a contract of insurance for the payment of a loss, inasmuch as a "policy" is but the written evidence of such a contract. (Civ. Code, sec. 2586.) Except for the failure to allege these facts specifically, the indictment was unobjectionable.

[6] The question is then presented whether these omissions resulted in prejudice to the respondent. Section 960



of the Penal Code provides: "No indictment . . . is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." Section 1404 of the same code declares: "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Many facts and circumstances shown by the record preclude the idea that the defects of the pleading prejudiced or tended to prejudice respondent's right to be sufficiently informed of the charge against him. In the first place the court instructed the jury as follows: "An intent to defraud is a material ingredient of the offense set forth in each of the three counts of the indictment, and you must not convict the defendant upon any of the said counts unless you believe beyond all reasonable doubt (1) That a contract of insurance existed between the defendant and the insurance company named in such count of the indictment; (2) That while such contract was in full force and effect that the defendant, in the county of Los Angeles, and within three years next preceding the filing of the indictment, presented or caused to be presented a false proof of claim to such company; (3) That the proof of loss so presented was willfully and intentionally false, and was presented with the intent on the part of the defendant to deceive and defraud said insurance company." It is plain that the instruction itself supplied the elements which are claimed to be lacking in the indictment, and it will be presumed that the jury followed this instruction when it found respondent guilty on each of the three counts.

Moreover, the policies were received in evidence without objection, and it was stipulated that they were issued to respondent by the respective companies. It was shown that respondent had previously sued two of the companies on their policies, and in the complaints in those actions he alleged the policies were issued to him. These complaints were received in evidence. In addition to this the proofs of loss, as we have shown, were set out *verbatim* in the complaint. These proofs, verified by respondent, set forth

that the policies were issued by the respective companies to respondent, and that a certain amount was claimed under each of them.

Apparently the attorneys for respondent did not discover the defects in the indictment until after the trial, for before the trial one of the attorneys presented an affidavit for a *subpoena duces tecum* in which he averred: "That he is one of the attorneys of record for the defendant herein, Roy R. Lauman. That the indictment charges the making of false proofs of loss as to two insurance policies: In Springfield Fire and Marine Insurance Company and the Concordia Fire Insurance Company, respectively. . . . That R. C. Heinsch is the agent of the Springfield Fire and Marine Insurance Company, and issued their policy No. 424,612. That N. T. Horton was the agent of the Concordia Fire Insurance Company, and issued their policy No. 30,804 . . . "

In *People v. Griesheimer*, 176 Cal. 44, [167 Pac. 521], the defendant was charged with the crime of obtaining money under false pretenses. The appeal was taken from the judgment of conviction and the order denying defendant's motion for a new trial. He was charged with falsely representing himself to be an agent of the "Fatherland Magazine," authorized to receive loans and subscriptions in its behalf, and with exhibiting a fictitious list of subscribers to induce persons to subscribe. In that capacity he was collecting money, and collected the sum of three hundred dollars from the prosecuting witness. The court, in holding the information to be sufficient, said: "The particular defect in this information, as urged by appellant, is that it does not show the causal connection between the false pretense and the parting with the property by the prosecuting witness, and therefore fails to state facts sufficient to constitute a public offense.

"We are of the opinion that as against the defendant's general demurrer the information should be held sufficient on appeal. While there is no direct allegation that the money was paid to the defendant as a subscription or loan to the 'Fatherland Magazine,' a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose. It may be conceded that a direct allegation to this effect would have been

more in accord with technical requirements. But what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that the money was paid because of the alleged false representations, and for the purpose suggested thereby."

The attorney-general cites section 4½, article VI, of the constitution in support of his argument that the defects in the indictment are not prejudicially erroneous. Respondent contends, on the other hand, that the provision does not apply to an appeal by the state from an order granting a motion in arrest of judgment. But as we have reached the conclusion that the defects are fully covered by the statutes referred to, whose terms are in line with the constitutional provision, the question need not be considered.

[7] Respondent cites no authority, and we are aware of none, which supports his third contention, that the indictment is defective in not alleging that the contract of insurance was in force at the time the proof of loss was presented. This position is untenable. The act denounced by section 549 of the Penal Code is the presentation of false proofs in support of a claim on a contract of insurance for the payment of a loss. The statute does not provide that the contract must be operative at the time the claim of loss is made. The indictment does allege that the policies were in full force and effect at the time the fires occurred, and it is true the court instructed the jury that it was necessary to a conviction that a false proof of loss be presented while the contract was in effect, and within three years next preceding the filing of the indictment. The indictment cannot be held to be defective in failing to allege that the contract was in full force and effect at the time the proof of loss was presented. To hold otherwise would be to lay down a rule that where the loss occurs while the contract is in full force and effect and the false proof of loss is not presented until after the period of coverage has expired, a case could not be made out under section 549 of the Penal Code. Such is not the law. Each count alleges that the policy was in full force and effect on a certain date, and gave the same date as the date of the fire. It was, therefore, unnecessary to allege that the policy was in full force and effect when the

proof of loss was made, for as matter of law it remained operative for the presentation of proof of loss. It appears from the indictment that the proof of loss was filed in each case within two months from the date of the two fires.

It must be held that the indictment substantially alleged facts sufficient to constitute a public offense under section 549 of the Penal Code and that respondent was not prejudiced by the defects of pleading complained of.

Order reversed and cause remanded for further proceedings in contemplation of sections 1191 and 1202 of the Penal Code.

Wilbur, J., Sloane, J., Lennon, J., and Angellotti, C. J., concurred.

Rehearing denied.

All the Justices concurred.

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[S. F. No. 9779. In Bank.—October 13, 1921.]

In the Matter of the Estate of MARGARET GRAHAM, Deceased. R. B. TAPPAN, as Executor, etc., Appellant, v. ANNA FORTMAN, Respondent.

[1] ESTATES OF DECEASED PERSONS—ATTORNEY AS EXECUTOR—RIGHT TO EMPLOY COUNSEL.—An executor or administrator of the estate of a deceased person, who is himself a practicing lawyer, is entitled to employ and pay from the estate an attorney for the performance of the usual and ordinary legal services that are incident to the probate proceeding.

APPEAL from a judgment of the Superior Court of Alameda County. E. C. Robinson, Judge. Reversed.

The facts are stated in the opinion of the court.

Nusbaumer & Bingaman for Appellant.

L. R. Weinmann for Respondent.

Allen G. Wright, *Amicus Curiae*, for Appellant.

Walton C. Webb, *Amicus Curiae*, for Respondent.

SLOANE, J.—This is an appeal by R. B. Tappan, executor of the last will of Margaret Graham, deceased, from an order of court denying an allowance, in the final account of the executor, of fees to an attorney employed by said executor in the administration of the estate of said decedent.

The executor Tappan is himself a practicing lawyer, and it was the ruling of the probate court that his employment of an attorney for the usual and ordinary legal proceedings of the administration was not a necessary expense of the administration. An allowance of attorney's fees was made for certain extraordinary services rendered by the attorney employed in the course of the administration. [1] So the only question presented is whether an executor or administrator, who is himself a practicing lawyer, is entitled to employ and pay from the estate an attorney for the performance of the usual and ordinary legal services that are incident to a probate proceeding.

The Code of Civil Procedure, as in force at the time this estate was in process of administration, contained the following provisions (sec. 1616): "Compensation of executor and administrator. He shall be allowed all necessary expenses in the care, management and settlement of the estate, and for his services such fees as provided in this chapter." (Sec. 1618.) "When no compensation is provided in the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of the estate accounted for by him." Then follows a graded scale of commissions varying with the valuation of the estate. Section 1619 provides that attorneys for executors and administrators shall be allowed out of the estate as fees "for conducting the ordinary probate proceedings the same amounts as are allowed by the last section, as compensation for executors and administrators for their own services."

The reasonable necessity for the employment of an attorney to prepare legal papers and conduct the ordinary court proceedings, by the average layman administrator is not disputed. Such employment is a matter of universal practice, the compensation is provided for by statute and made equal to that of the executor or administrator, and such allowance is not made an issue in this case further than to claim an exception where such executor or administrator is

himself a lawyer and competent to perform the legal services required.

We may therefore confine ourselves to a consideration of the question whether a duty rests upon the executor who is a lawyer to render this professional legal service to the estate without additional compensation rather than to employ another attorney for such service.

Counsel in this case are disposed to agree that if the executor does perform these legal services, he may not receive extra compensation therefor.

The issue presented here is whether the performance of such professional legal duties is part of the service designated by the code when it provides that the executor or administrator shall receive "for his services such fees as are provided in this chapter." It is clear that the services incumbent upon the executor in the exercise of his duty to the estate are the same, irrespective of his general vocation in life. The "care, management and settlement of the estate" referred to in section 1616, *supra*, may call for the services of a plumber, a carpenter, an auctioneer, a real estate agent, an expert accountant. Must the administrator render these services if they happen to be in the line of his general occupation? Clearly not. He would be entitled to hire such work done and pay for it as part of the "necessary expense of the care, management and settlement of the estate." If he did perform such services which were not in the line of his duty as administrator, he might not be permitted to receive compensation, but the reason would be one of public policy forbidding him to be his own employer.

In many of the states, and in California prior to 1873, attorney's fees have been approved under the general provision that the administrator "shall be allowed all necessary expenses in the care, management and settlement of the estate," and, as already pointed out, under such general provision an attorney administrator would be no more called upon to give his professional services to the estate than would the plumber, carpenter, or accountant administrator, to render services that might be required in his special line of business, when the care and management of the estate should call for such employment.

It is true that such services as just referred to are of a more exceptional and casual nature than that of handling the legal business of an administration, but that is an additional reason why the latter should not be gratuitously added to the responsibilities of the lawyer administrator, while all others are allowed to avail themselves of outside legal assistance.

The legal end of the probate of an estate has come to be recognized as a distinct branch of employment. Hence, we have had various amendments to the code recognizing and providing for such legal services. In 1873 there was added to the general provision hereinbefore quoted providing for an allowance to the administrator of all "necessary expenses," etc., the words "including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in the probate or other courts." In 1905 the legislature advanced the position of an attorney in probate matters, so far as relates to compensation, to an equality with the administrator, upon a commission basis graduated according to the value of the estate, and in 1909 the law as it now stands was enacted which gives the same compensation to the attorney for the ordinary legal services of a probate proceeding as are allowed to the administrator for the ordinary business administration of the estate.

We are bound to assume that the legislature in its deliberations has determined that the services rendered by the administrator and by the attorney in such probate proceedings are of equal value, and that the compensation to each is a reasonable compensation for the service rendered. It certainly would be an unjust interpretation of the law which would require of the lawyer administrator twice the service for the same pay that is required of the merchant or mechanic or physician in the same position.

Although the employment of an attorney for the probate of an estate is not required by law, such employment is recognized by our legislation as the usual and customary practice, and it is doubtless conducive to system and accuracy in the administration of the probate law. The probate procedure in California may be considered by many as unduly intricate and expensive, but it cannot be disputed that it is effective in the settlement of estates and the transmission of



property and titles in a way to protect the rights of creditors and of heirs and devisees.

The whole matter of the disposition of the estates of deceased persons is within the legislative control. Our legislature has seen fit to recognize the services and compensation of the administrator, and the services and compensation of an attorney, as relating to distinct employments in probate administration.

There are, and have been to the knowledge of all legislators, hundreds of practicing lawyers serving as executors and administrators, but there has been no intimation in any law upon the subject that a different rule should apply to a lawyer in such position in the matter of employing legal assistance than to an administrator of any other business calling.

And in all of the innumerable instances in this and in other states where lawyer administrators have employed and paid attorneys there seems to be but one case in the courts where the right of such employment has been called in question.

There are decisions cited where, on grounds of public policy, it has been held that an administrator rendering legal services cannot receive additional compensation therefor. (*Taylor v. Wright*, 93 Ind. 121; *Hough v. Harvey*, 71 Ill. 72; *Collier v. Munn*, 41 N. Y. 143; *Bushby v. Berkeley*, 153 App. Div. 742, [138 N. Y. Supp. 831]; *Doss v. Stevens*, 13 Colo. App. 535, [59 Pac. 67].)

Other courts have upheld allowances to the administrator for legal services rendered by him as an attorney in the interests of the estate. (*Harris v. Martin*, 9 Ala. 895; *Morgan v. Nelson*, 43 Ala. 586; *In re Mabley's Estate*, 74 Mich. 143, [41 N. W. 835]; *Chatfield v. Swing*, 6 Ohio Dec. 666; *Fulton v. Davidson*, 50 Tenn. 614.)

The only decision which the diligence of the counsel in this action and of *amicus curiae* filing briefs in behalf of this matter has been able to find bearing upon the right of such administrator to employ an attorney is that of *Noble v. Whitten*, 38 Wash. 262, [80 Pac. 451]. This decision was under a statute similar to the provisions of the California law prior to 1873, which merely allowed to the administrator "all necessary expenses in the care, management and settlement of the estate." It was there held that the adminis-

trator, who was a practicing lawyer, was not under the necessity of employing additional legal assistance and was not entitled to an allowance therefor. It is said in the course of the opinion: "In this case the record shows that the administrator was a lawyer. He had control of the estate as agent and attorney for the deceased during her lifetime. He was allowed a claim of two hundred dollars for services and advice to Mrs. Whitten prior to her death. Mr. Whitten, the principal heir, desired to retain him as attorney to represent 'my interest and that of my children, if any, and continue to manage the property so far at least as our interests are concerned,' and upon this request Mr. Noble voluntarily offered to serve as administrator. Because of these facts no doubt Mr. Whitten consented to his appointment as administrator and because of his ability and fitness to conduct the administration of the estate the court appointed him."

To what extent the court was influenced in the decision cited by the circumstances referred to, as to the choice of this administrator with a view to his legal services, does not appear. In the application of the limitation as a general rule, especially in view of the more specific recognition of the functions of an employed attorney under our code, its authority is not controlling and its reasoning is not convincing.

Conceding that it is still within the discretion of the probate court in this state to pass upon the necessity for the employment of an attorney in the administration of an estate, the same as upon other matters of necessary expenditure, we are satisfied that denial of such necessity cannot be made to rest upon the mere fact that the required services are in the line of the administrator's profession or business.

The order appealed from is reversed.

Wilbur, J., Lennon, J., Lawlor, J., and Angellotti, C. J., concurred.

Rehearing denied.

All the Justices concurred.

[L. A. No. 6616. In Bank.—October 14, 1921.]

JOHN S. CHAMBERS, as Controller, etc., Respondent, v.  
ROSE SKEEL MUMFORD, Appellant.

[1] INHERITANCE TAX—NONRESIDENT TESTATOR—SITUS OF CHOSSES IN ACTION.—The interest of a nonresident testator in the proceeds of a promissory note, acquired by contract and held in this state, does not constitute "property within this state," under sections 1 and 2 of the Inheritance Tax Act of 1913 (Stats. 1913, p. 1066), and it is not subject to an inheritance tax in view of the rule in this state that the *situs* of choses in action follows the domicile of the owner.

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Rives, Judge. Reversed.

The facts are stated in the opinion of the court.

Newlin & Ashburn for Appellant.

James L. Atteridge, John W. Carrigan and Edwin H. Pennock for Respondent.

SLOANE, J.—This appeal involves the liability to an inheritance tax in the state of California of certain property interests passing to the defendant and appellant, Rose Skeel Mumford, under the last will of her deceased husband. Both the decedent and the appellant were at the time of the former's death nonresidents of the state of California, having their domicile in New Jersey. The property interest involved consisted of a contractual interest held for the testator by trustees, also nonresidents of California, in the proceeds of a promissory note executed by a resident of California to the defendant, Title Insurance and Trust Company of Los Angeles, in its capacity as administrator of the estate of one Arcadia B. deBaker, deceased. The Trust Company is a California corporation, and the note at all times was held, owing, and payable in the state of California, and was secured by a mortgage on California real estate.

The interest of testator, appellant's husband, in the proceeds of this note arose under the following conditions. He with other persons claiming to be interested as heirs in the

deBaker estate, in order to prosecute their claims advantageously, assigned their respective interests growing out of such claims to trustees, who were empowered to act for them. These trustees have likewise at all times involved in this proceeding been nonresidents of the state of California.

These claims of heirship were litigated in the superior court in the county of Los Angeles, but met with an adverse ruling from which an appeal was taken to this court. During the pendency of this appeal a contract of settlement was entered into with the deBaker heirs, or most of them, whereby these heirs agreed to procure a complete assignment of this note and a distribution thereof from the deBaker estate to these trustees. Such was the status of the transaction at the time respondent succeeded to her husband's interests at the time of his death.

This contract was thereafter carried out and the note was distributed to these nonresident trustees, and subsequently the amount of the note was collected by the Title Insurance Company, which continued to hold the note after distribution, as the agents of the nonresident trustees.

The principal sum of the note was \$704,439.50, of which amount Mumford's interest was an undivided one-sixth.

At the time of the commencement of this action the note had been collected and sufficient of the amount due the respondent from her husband's share remained in the hands of the defendant Title Insurance Company to satisfy the inheritance tax demanded.

No question is raised as to the amount of or liability for this tax, if it is a proper charge against the interest which passed to respondent under her husband's will.

In determining the liability of this interest under the inheritance tax laws of California, the matter may be simplified without at all changing the legal aspect of the case by eliminating from consideration all facts involving the nonresident trusteeship, and the deBaker estate. The contract with the trustees was for the sole use and benefit of the beneficiaries of that trust, and the interest thereby created did not pass to them as heirs of the deBaker estate but by virtue of the contract in settlement of the litigated claim.

The fact that the property interest in question was acquired by assignment from the deBaker heirs and afterward

vested in the assignees by virtue of a decree in the deBaker estate presents no different condition than if the rights had been created by contract and assignment from the original payee of the note. Neither is there any different situation created by the fact that the Mumford interest was held by a trustee than if the entire transaction had been carried on directly with Mumford in person.

The note was executed by a resident of California to a resident of California and secured by mortgage on California real estate. The note itself was at all times retained in California in the hands of the payee, who afterward became the agent of the assignee and who collected the money due on the note and retains it in the state of California for the benefit of the appellant.

[1] There is no dispute as to the facts, and the sole question involved is whether or not the interest of the non-resident testator acquired under the contract to assign, constituted "property within this state," under sections 1 and 2 of the California Inheritance Tax Act of 1913 (Stats. 1913, p. 1066).

It is conceded that the succession to the property is subject to the inheritance tax only in the event that the interest passing to appellant is property within the state of California.

There has been in several of the states in the matter of fixing the *situs* of personality for purposes of taxation under the inheritance tax laws a far departure from the common-law rule, and commonly accepted rule that such property follows the domicile of the owner.

It is impracticable to trace the modification of this rule through all its ramifications, but it may be said that as to all tangible personal assets it has become the settled law that they are subject to inheritance tax in the state where they are located at the time of the succession, under statutes imposing such tax upon property of a nonresident owner situated within the state. (Blakemore & Bancroft on Inheritance Taxes, p. 143; *Blackstone v. Miller*, 188 U. S. 189, [47 L. Ed. 439, 23 Sup. Ct. Rep. 277, see, also, Rose's U. S. Notes]; *McDougald v. Lilienthal*, 174 Cal. 698, [L. R. A. 1917F, 267, 164 Pac. 387]; *State v. Dalrymple*, 70 Md. 594, [3 L. R. A. 372, 17 Atl. 82]; *In re Rogers*, 149 Mich. 305, [119 Am. St. Rep. 677, 11 L. R. A. (N. S.) 1134, 112 N. W.

931].) Some of the authorities may be said to have gone further, and for the purposes of such taxation to have fixed the *situs* of intangible property interests such as contract debts and other mere choses in action, within the jurisdiction where the debtor resides and to which the creditor must come to enforce his claim.

The rule supported by these authorities, as applying to choses in action against nonresidents of the state where the inheritance tax is claimed, is that if the owner must invoke the laws of that state to reduce his claim to possession, or secure the beneficial enjoyment thereof, and particularly if the security and evidences of indebtedness are in that state, the property interest is one within the state and subject to the local tax. (*State v. Probate Court*, 128 Minn. 371, [L. R. A. 1916A, 901, 150 N. W. 1094]; *Blackstone v. Miller, supra*; *People v. Griffith*, 245 Ill. 532, [92 N. E. 313]; *Greves v. Shaw*, 173 Mass. 205, [53 N. E. 372]; *State ex rel. v. District Court*, 41 Mont. 357, [109 Pac. 438]; *Matter of Houdayer*, 150 N. Y. 37, [55 Am. St. Rep. 642, 34 L. R. A. 235, 44 N. E. 718]; *In re Rogers, supra*; *State v. St. Louis etc. Court*, 128 Minn. 371, [L. R. A. 1916A, 901, 150 N. W. 1098]; *State v. Ramsey County Probate Court*, 124 Minn. 508, [Ann. Cas. 1915B, 861, 50 L. R. A. (N. S.) 262, 145 N. W. 390].)

*In re Blackstone's Estate* is a leading case arising in the New York courts and affirmed by the supreme court of the United States (69 App. Div. 127, [74 N. Y. Supp. 508]; affirmed, 171 N. Y. 682, [64 N. E. 1118]; affirmed, 188 U. S. 189, [47 L. Ed. 439, 23 Sup. Ct. Rep. 277, see, also, Rose's U. S. Notes]).

In that case the decedent was a resident of the state of Illinois. At his death he left deposits of money in a trust company in the city of New York, and also in a New York bank. The deposits were subject to payment on demand of the Illinois creditor. They constituted choses in action, as the relation between the bank and its depositors is merely one of debtor and creditor.

These claims were held on contested hearing in the supreme court of New York to be property in that state. This decision was affirmed by the court of appeals in a memorandum opinion, and again by the supreme court of the United States on writ of error to that court.

✓ It may be said, however, for these decisions holding that bank deposits are property in the state where the bank account is created, that they rest to some extent upon the popular fiction that the bank deposit represents actual money in specie. It would require a further and somewhat advanced step to apply this construction to any ordinary contract debt.

It may be admitted that there is much reason and perhaps sound policy for accepting a rule which recognizes as the *situs* of contract debts the place where the debtor resides, and to which the creditor must come to enforce his claim. It may be said with truth that everything which gives value to such a claim exists at the domicile of the debtor.

✓ The adopting of such a rule in California, however, would be a reversal of the common-law doctrine of *mobilia sequuntur personam* which has prevailed in this state and which has been followed by our courts in determining the *situs* of choses in action.

The decisions of the courts of other states, and of the supreme court of the United States construing the statutes of other states, may be suggestive, but are not controlling in determining what constitutes property within the state of California.

✓ No distinction is apparent in the use of the word "property" in our inheritance tax law to differentiate it from the same term in the laws governing the levy and collection of an ordinary property tax. Under section 1, article XIII, of the constitution, and section 3607 of the Political Code, "all property in this state" (subject to certain exemptions) is made subject to taxation for revenue. The term under consideration in the inheritance tax law is "property within this state."

✓ There seems to be no room under our statutes for the distinction as to definitions of property which exists in many jurisdictions between the property tax and the tax upon succession to property.

The California rule as to property taxes is stated in *Estate of Fair*, 128 Cal. 612, [61 Pac. 186], as follows: "As to corporeal chattels such as live animals, manufactured goods and the like, it is doubtless the rule that they are taxable in the state where they have local situation, though the owner may reside elsewhere. . . . The general rule is that



debts attend the person of the creditor and are taxable at his domicile." (*San Francisco v. Lux*, 64 Cal. 481-483, [2 Pac. 254]; *San Francisco v. Mackay*, 113 Cal. 398, 399, [45 Pac. 696]; *People v. Park*, 23 Cal. 139.)

In *Mackay v. San Francisco*, 128 Cal. 681, [61 Pac. 382], it is said: "The weight of authority is that a debt so due or to become due should be taxed at the place of residence of the creditor or owner, and that the *situs* of the debt is that of its owner, and that it is not property in the state of the debtor."

A concession has been made under the decisions of this court in the right to modify the application of the maxim, *mobilia sequuntur personam*, in the matter of certificates of stock in a domestic corporation. It has been held for purposes of the inheritance tax law the *situs* of stock in a corporation is in the state of the incorporation. (*McDougald v. Low*, 164 Cal. 107, 110, [127 Pac. 1027]; *Murphy v. Crouse*, 135 Cal. 19, [87 Am. St. Rep. 90, 66 Pac. 971]; *McDougald v. Lilienthal*, 174 Cal. 701, [L. R. A. 1917F, 267, 164 Pac. 387].) A reason for making a distinction between certificates of stock, and ordinary choses in action, is in the fact that the former represent an interest in and derive their value from the tangible assets of the corporation.

Beyond this the California decisions have shown no disposition to limit or modify the common-law rule that the *situs* of mere choses in action follows the domicile of the owner.

The nearest adjudication of this point as applied to the inheritance tax law we have in California is in the *Estate of Hodges*, 170 Cal. 492, [L. R. A. 1916A, 837, 150 Pac. 344], where it was held that certain bonds and securities, deposits in bank, and other chattels held in the state of Massachusetts but owned by a resident in California, were subject to an inheritance tax in this state. Discussing the application of the maxim, *mobilia sequuntur personam*, Mr. Justice Lorigan, writing the opinion, says: "That maxim, universally applied in the jurisdictions of all civilized nations, is that the personal estate of a decedent, wherever it may in fact be located, is, for the purposes of succession and distribution, deemed to have no other locality than the domicile of the decedent. As a general rule, the domicile of the decedent draws to it in contemplation of law all the personal property of the decedent no matter where its actual

*situs* may be at the time of his death, and the distribution of it is governed and controlled by the laws of succession existing at the place of the domicile of the decedent. The courts of the various states have had frequent occasion to pass upon the power of a state having jurisdiction through its courts over the estate of a domiciled decedent to impose an inheritance tax upon the personal property of such decedent located outside of the state, and the authorities are uniform in holding that though personal property may be actually located in another state than that of the residence of the decedent at the time of his death, its *situs* for the purpose of imposing an inheritance tax upon it is in the state which was the domicile of the decedent and where the primary administration of his estate is being had. (Ross on Inheritance Taxation, pp. 221, 229; Blakemore and Bancroft on Inheritance Taxes, secs. 207, 225; Dos Passos on Inheritance Tax Law, 2d ed., sec. 29; *Estate of Swift*, 137 N. Y. 77, [18 L. R. A. 709, 32 N. E. 1096]; *Frothingham v. Shaw*, 175 Mass. 59, [78 Am. St. Rep. 475, 55 N. E. 623]; *People v. Union Trust Co.*, 255 Ill. 168, [Ann. Cas. 1913D, 514, 99 N. E. 377]; *In re Bullen's Estate*, 143 Wis. 512, [139 Am. St. Rep. 1114, 128 N. W. 109]; *Mann v. State Treasurer*, 74 N. H. 345, [15 L. R. A. (N. S.) 150, 68 Atl. 130]; *In re Dingham's Estate*, 66 App. Div. 228, [72 N. Y. Supp. 694]; *In re Hartman*, 70 N. J. Eq. 664, [62 Atl. 560]; *State v. Probate Court*, 121 Minn. 508, [50 L. R. A. (N. S.) 262, 145 N. W. 390]; *Commonwealth v. Williams*, 102 Va. 778, [1 Ann. Cas. 434, 47 S. E. 867]; *Estate of Bittinger*, 129 Pa. St. 338, [18 Atl. 132].)

“All of these cases were decided in favor of the right of the state having control of the primary administration of the estate through the application of the maxim *mobilia sequuntur personam*; the well-established general rule that the personal property of a decedent wherever situated is governed by the law of the domicile of the owner both as to distribution and the right to succession.”

Such application of this rule has been established by a line of decisions antedating the inheritance tax, and as there is nothing in the enactments creating the inheritance tax to limit or change such application of the rule, it must be held under familiar rules of construction that in the use of the term “property in this state,” the legislature intended it

to have the same meaning as had already been given to practically the same expression in the laws governing property taxes.

This rule of construction has been in force so long and has been so consistently followed that if it is to be changed or modified it should be by the legislature and not by the courts.

The judgment is reversed.

Wilbur, J., Lennon, J., Lawlor, J., Shurtleff, J., and Angellotti, C. J., concurred.

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[L. A. Nos. 6628, 6629, 6630, 6631. In Bank.—October 14, 1921.]

FRANK H. SMITH, Jr., et al., Respondents, v. R. B. BLODGET, et al., Appellants.

- [1] **CONTRACTS—AGREEMENT TO SELL LAND—PRINCIPAL AND AGENT—VENDOR AND VENDEE—INTENT.**—Whether an agreement permitting a person “to sell” land on certain terms creates the relation of principal and agent or that of vendor and purchaser under a contract of sale depends upon the intention of the parties.
- [2] **ID.—AMBIGUITY—CONSTRUCTION BY PARTIES.**—Where the intention of the parties to a contract is imperfectly expressed and the language employed by them is ambiguous and requires interpretation, it is permissible for the court to take into consideration the construction placed upon the instrument by the various persons concerned.
- [3] **ID.—ACTION FOR ACCOUNTING—SALE OF LAND UNDER OPTION—FAILURE TO SIGN OPTION.**—In an action for an accounting to recover from defendants profits derived from a sale of land effected by them, without the knowledge and consent of plaintiffs, by means of an option given to the plaintiffs by the land owners, the failure of the trustee for the owners to sign the option is of no avail to the defendants, where the sale was consummated by them under the option and its terms were observed and complied with without question by all of the owners of the land.
- [4] **FRAUD—ACCOUNTING—JURISDICTION—EQUITY.**—An action for an accounting lies within the jurisdiction of equity, among other instances, in cases of fraud as well as where there is a fiduciary relation between the parties and the facts are peculiarly within the knowledge of one; and having once taken jurisdiction, the court

will grant further relief demanded by the situation and necessary to complete justice.

- [5] **ID. — CONSPIRACY — LIABILITY OF SEVERAL PARTIES.** — If through fraud and conspiracy other defendants assisted one of the defendants in violating his obligation to his principal by effecting a sale of land under an option given to plaintiffs, without plaintiffs' knowledge, and in retaining the proceeds, they, as well as the other defendant, are equally liable for all the consequences of the conspiracy, regardless of the extent of their participation or the share of the profits obtained by them.
- [6] **ID.—VIOLATION OF FIDUCIARY OBLIGATION—LIABILITY OF PARTIES ASSISTING—ACCOUNTING—JUDGMENT.**—Where, after the violation of a fiduciary obligation, an accounting is had and an amount found to be due from the agent or trustee, judgment for the same amount may also be rendered against those proven to have fraudulently aided in the attempt of the fiduciary to obtain secret profits, although they themselves are not fiduciaries and received no share of the profits.
- [7] **ID.—CONFLICTING EVIDENCE—FINDINGS.**—Where, although the trial court might have drawn the inference from the evidence before it that one of the defendants in such case did not act in conjunction with the other defendants in the matter, the conclusion reached was that said defendant was implicated in the conspiracy and the evidence was conflicting, and it was possible to draw conflicting inferences from that part of the evidence which was not itself conflicting, the conclusion cannot be disturbed on appeal.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Affirmed.

The facts are stated in the opinion of the court.

Charles J. Kelly, D. A. Stuart, Blodget & Blodget, N. P. Moerdyke, John C. Stick, Rosecrans & Emme and E. F. Crawford for Appellants.

Fred N. Arnoldy for Respondents.

**LENNON, J.**—From the following facts the present litigation arose: Plaintiffs were the owners of certain land in Kern County, California, and desired to dispose of the same. In June, 1918, plaintiff Frank H. Smith, Sr., held a conversation with defendants R. B. Blodget and T. E. Commins, dealers in real estate, wherein defendant Blodget stated that the Associated Oil Company was interested in purchasing

a thousand contiguous acres in said county at \$150 an acre and that plaintiffs' land was in the contemplated area. The necessity of securing united action on the part of the several owners of the land in the tract under consideration was discussed and plaintiff Smith, Sr., stated that his son, Frank H. Smith, Jr., could obtain a written option on 160 acres thereof which was owned by several persons jointly, to wit, C. H. Plummer, Emelie H. Smith, and certain others represented by Leslie S. Smith as trustee. The subsequent dealings concerning this particular parcel of land, called the "Plummer quarter section," gave rise to the present controversy. Pursuant to the above conversation, Smith, Jr., obtained a written instrument reading:

"Los Angeles, July 15th, 1918.

"This agreement witnesseth that we herewith give to Frank H. Smith, Jr., an option on our land S.W.  $\frac{1}{4}$  Section 18, T 11N, R 22W, S.B.M., to handle & sell for us at a net price to us of \$100.00 per acre. This option good for 60 days from date except that it may be revocable by a 10-days notice to him or to his last P. O. address.

"C. H. PLUMMER.

"EMELIE H. SMITH."

This authorization plaintiffs immediately entrusted to defendant Blodget, under an agreement that Blodget should act as their agent in finding a purchaser for the said land at \$150 per acre, in which event Blodget was to receive a commission of two thousand dollars. Later, on August 10, 1918, plaintiffs agreed that Blodget's commission should be raised to two thousand five hundred dollars. In the meantime defendant Blodget had discussed the proposed sale with defendants Potter and Fickeissen, each of whom owned a quarter-section in the thousand acre tract. After learning of the contemplated deal, defendant Potter engaged Smith, Jr., in a conversation and discovered that he was about to leave town on a thirty-day vacation. Shortly thereafter defendant Potter succeeded in inducing the owners of the Plummer quarter-section to give plaintiffs a ten-days' notice of the cancellation of their option, to take effect on August 27th, and to give defendant Potter an option on the same property commencing on the day on which the plaintiffs' option expired. Smith, Sr., who was not on friendly terms

with the owners of the Plummer property, received the notice of cancellation on August 17th, during the absence of his son on a vacation at a point where it would be difficult to reach him by mail or telegraph.

About the same time that the notice of cancellation was delivered word was received that the Associated Oil Company was not interested in the purchase of the lands. Defendant Blodget then assured plaintiff Smith, Sr., that he would be able to dispose of the Plummer property to other purchasers prior to the expiration of the plaintiffs' option. In these representations he was joined by defendants Commins and Fickeissen, the latter having met Smith in the meantime. All three defendants mentioned one Patterson and Graham as prospective purchasers of the land. As a matter of fact, Patterson and Graham never had any intention of buying the property and were never considered by any of the defendants to be likely purchasers. Finally, on August 26th, the last day of the life of plaintiffs' option, a meeting was held at the office of defendant Commins, at which defendants Commins, Blodget, and Fickeissen met plaintiff Smith, Sr., by appointment. Defendants then stated that, as the option was about to expire, it would be necessary to furnish the sum of \$250 to be paid to the grantors of the option in order to secure a thirty-day extension. The sum was advanced by the three defendants present, defendant Fickeissen making a statement to the effect that, as she was putting up half the money, she wanted half the proceeds. This money was paid to the grantors as a deposit on the exercise of the option and to apply on the payment of the purchase price, and the parties were thereupon given thirty days in which to complete the purchase. At the time this payment was made defendants Blodget, Commins, and Fickeissen represented to Smith, Sr., that they had found a purchaser by the name of Gross, an old friend of defendant Fickeissen, who resided in St. Louis, Missouri, and was taking a trip to California. Later, on September 3d, defendant Blodget induced Smith, Jr., who had then returned, to execute and deliver to said Blodget an assignment of the plaintiffs' option. This assignment was procured without consideration upon the representation that it constituted a mere agency authorization and that its sole purpose was to afford written evidence of Blodget's

authority to represent plaintiffs in selling the land to Gross. Defendants dated this assignment "August 9, 1918." Various representations were made by the said defendants to plaintiffs from time to time to the effect that Gross had been communicated with, had arrived in town, and that a sale to him was under way. However, on September 23d, Smith, Sr., discovered that the dealings with Gross were purely mythical. If any such person existed, defendants never communicated with him and he was never a prospective purchaser of the land in question. Upon this revelation, plaintiffs demanded the return of their option, but defendant Blodget had delivered it to defendant Fickeissen, who refused to surrender it. The evidence reveals that on September 18th, without plaintiffs' knowledge, Blodget had executed an option to purchase the property in question in favor of one Graham, and on the following day Graham executed a similar option to defendant Potter. A few days later, as a result and by means of the assignment to defendant Blodget of plaintiff's option and Blodget's option to Graham and the latter's option to Potter, a sale of the land was consummated by defendant Potter to the Chanslor Canfield Midway Oil Company for the price of \$125 an acre, or over twenty thousand dollars. Previous to this sale, defendant Potter had effected sales to said Chanslor Canfield Company of at least three other quarter-sections in the vicinity of the Plummer property, including the quarter-sections belonging to himself, defendant Fickeissen, and a third person not involved in this controversy. The four defendants retained the proceeds of this sale of the Plummer land over and above the sum paid to the owners of the property (about sixteen thousand dollars) and incidental expenses amounting to a few hundred dollars. Plaintiffs instituted the present action for the sum thus retained and the trial court rendered a judgment against all the defendants jointly for the sum of \$3,945.50. The four defendants have appealed separately, but since each appeals on the same grounds as the others, they have joined in the preparation of briefs, and the briefs filed by each are identical in content.

According to defendants' theory, the written instrument executed by C. H. Plummer and Emelie Smith in favor of Smith, Jr., is not an option to purchase, but merely an



authorization to sell the property as agent of the owners. If this be so, defendants affirm that the said instrument was inadmissible under the issues raised by the pleadings and that defendants' objection to its introduction in evidence should have been sustained, for the reason that in the present suit plaintiffs seek to recover the portion of the proceeds of the sale retained by defendants, not as agents and on behalf of the vendors of the land, but as owners of the said funds by virtue of rights arising under an option to purchase the land.

The fact that the agreement conferred the option to "handle & sell" the property for a certain sum, rather than to "purchase," does not, as defendants contend, necessitate the conclusion that the contract is merely one of agency. [1] Whether an agreement permitting a person "to sell" land on certain terms creates the relation of principal and agent or that of vendor and purchaser under a contract of sale depends upon the intention of the parties. (James on Law of Option Contracts, sec. 114.) Where there was a revocable authorization to a firm of real estate agents to sell land for ten thousand dollars net to the owners, with an agreement to pay "a commission of all over said sum of ten thousand dollars net, for which they may sell said property with our consent," it was held in this state that a sale by the firm under this agreement was effected in the capacity of vendor on its own account and not as agent of the owners of the land. (*Robinson v. Easton, Eldridge & Co.*, 93 Cal. 80, [27 Am. St. Rep. 167, 28 Pac. 796].) The determining factor in that case was the direct interest in and right to a part of the proceeds of the sale which was granted to the persons making the sale. The written instrument in the case at bar contains no express provision that plaintiffs shall retain that portion of the purchase price which exceeds the specified selling price. However, Smith, Jr., is given the right to sell "at a net price to us [the owners] of \$100.00 per acre." Had the contract stated that Smith was authorized to sell the property for not less than one hundred dollars per acre net to the owners, it might be held that the provision was purely one of limitation and that the intent was fairly clear that the person bringing about the sale should have no interest in the proceeds as such. (*Allen v. Clopton* (Tex. Civ. App.), 135 S. W. 242.) But the broad

and unrestricted provision giving Smith the right to effect a sale at a net price to the owners of one hundred dollars per acre is susceptible of sundry interpretations. It may mean that all net proceeds above the specified price belong to him, the owners of the property agreeing to part with all interest in the property, whatever the price may be, provided they receive the sum of one hundred dollars per acre free from all deductions, in which case Smith would be in the position of a vendor selling on his own account; it may mean that the owners of the property are entitled to receive all of the net proceeds of the sale and that Smith cannot look to them for any compensation for services unless he obtains for them a net price in excess of one hundred dollars per acre, and in that case he would be a mere agent. (*Ford v. Brown*, 120 Cal. 551, [52 Pac. 817]; *Wolverton v. Tuttle*, 51 Or. 501, [94 Pac. 961, 963].) The provisions of the contract are not clear in this respect. [2] If this were a case where the parties had plainly failed to make any provision for compensation, a simple agreement to pay the reasonable value for the services of an agent would be implied (*Ford v. Brown*, *supra*; *Kennedy v. Merickel*, 8 Cal. App. 378, 383, [97 Pac. 81]), but the case here presented is one where the intention of the parties is imperfectly expressed and the language employed by them is ambiguous and requires interpretation. It was, therefore, permissible for the court to take into consideration the construction placed upon the instrument by the various persons concerned. (*Mittau v. Roddan*, 149 Cal. 2, 14, [6 L. R. A. (N. S.) 275, 84 Pac. 145].) Taking into consideration the dealings previously set forth, the various assignments of the option and the manner in which the sale was conducted by all the persons involved, the evidence must be held sufficient to support the finding of the trial court "that the said instrument was acted upon and construed by the grantors thereof and all the parties to this action as an option and not as a mere agency authorization." It follows, therefore, that the plaintiffs were entitled to that portion of the net proceeds in excess of one hundred dollars per acre.

[3] On this appeal, defendants raise the objection for the first time that the instrument in question was not signed by Leslie Smith, trustee for some of the owners of the land sold. This objection is of no avail to defendants in this

case in view of the fact that a sale of the land was consummated by defendants under the said option and the terms of the option were observed and complied with without question by all of the owners of the land. Whether or not the written instrument was of value at the time it was first acquired by plaintiffs, it subsequently attained value and defendants cannot now attack it upon this ground after having assumed a fiduciary relation to plaintiffs in regard to it and realized financial profit by means of it.

The complaint sets forth two causes of action, one for money had and received and one for an accounting. The case was tried and decided under the latter count. Defendants claim that the action was in reality an equitable action for an accounting against defendant Blodget for failure to carry out his agency agreement and not one for damages for fraud and, therefore, that it was error for the trial court to render a judgment against all four defendants jointly for the amount found to be due from defendant Blodget.

[4] An action for an accounting lies within the jurisdiction of equity, among other instances, in cases of fraud as well as where there is a fiduciary relation between the parties and the facts are peculiarly within the knowledge of one. (2 Pomeroy's Equity Jurisprudence, sec. 910; 4 Pomeroy's Equity Jurisprudence, sec. 1421.) Having once taken jurisdiction, the court will grant further relief demanded by the situation and necessary to complete justice.

[5] If through fraud and conspiracy other defendants assisted the defendant Blodget in violating his obligation to his principal by effecting a sale without plaintiff's knowledge and retaining the proceeds, they, as well as the agent Blodget, are equally liable for all the consequences of the conspiracy, regardless of the extent of their participation or the share of the profits obtained by them. It is the civil wrong, not the conspiracy, which constitutes the cause of action, and, therefore, the plaintiff may bring his suit along any lines which he deems most likely to afford him redress for the particular injury which he has sustained and, if successful in proving an injury of the nature claimed, may recover judgment in that action against all those who have united or co-operated in inflicting that injury. (*Revert v. Hesse*, 184 Cal. 295, [193 Pac. 943].) [6] And

where, after the violation of a fiduciary obligation, an accounting is had and an amount found to be due from the agent or trustee, judgment for the same amount may also be rendered against those proven to have fraudulently aided in the attempt of the fiduciary to obtain secret profits, although they themselves are not fiduciaries and receive no share of the profits. (*Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, [18 L. R. A. (N. S.) 1106, 97 Pac. 10].)

It is not and, in view of the evidence, cannot be argued that defendants Blodget, Commins, and Fickeissen did not enter into and succeed in a conspiracy to effect a sale under plaintiffs' option without plaintiffs' knowledge and to retain the proceeds thereof. It is, however, contended that there is no evidence to sustain the finding that defendant Potter was involved in these dealings.

The trial court might have drawn the inference from the evidence before it that defendant Potter did not act in conjunction with the other defendants in this matter. [7] However, the conclusion reached was that said defendant was implicated in the conspiracy and, in view of the fact that the evidence was conflicting and that it was possible to draw conflicting inferences from that part of the evidence which was not itself conflicting, the conclusion cannot be disturbed on appeal. Defendant Potter's participation in the conspiracy was more veiled than that of the other defendants, and it is difficult to ascertain the exact point of time at which he came within the orbit of the conspiracy. However, "the law recognizes the intrinsic difficulty of proving a conspiracy. . . . The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances." (*Revert v. Hesse, supra; Woodruff v. Hughes*, 2 Ga. App. 361, [58 S. E. 551].) When we consider that the climax in which the conspiracy culminated was an act consummated by defendant Potter, namely, the sale of the property to the Chanslor Canfield Oil Company; that during the negotiations herein set forth the said defendant was actively engaged in selling to the same company other land in the vicinity; that Patterson, Graham, and defendant Fickeissen, all of whom seem responsible for considerable, and effective, negotiating between the various parties, were close friends or former business associates of defendant

Potter, we believe the circumstances proven were such as to support the conclusion of the trial court that defendant Potter, if not the instigating and moving force behind the whole transaction, was at least implicated in the conspiracy. Defendants claim that it is absurd to hold that defendant Potter had any part in keeping alive plaintiffs' option by paying \$250 on deposit on August 26th, and that it would have been to defendant Potter's interest to have permitted the option to expire and proceed under his own option, which he had obtained from the owners of the property. However, it may very well be that his own option was less favorable in its terms than plaintiffs' option and that defendant Potter's only object in procuring it was to enable the other defendants to more easily get control of plaintiffs' option by curtailing the life of the latter option. But, even assuming that defendants Blodget, Fickeissen, and Commins were acting adversely to defendant Potter in extending the plaintiffs' option on August 26th, by raising the sum of \$250, nevertheless "it was not essential to liability on his part that he should have been a party to the scheme from its inception." (*Lomita Land & Water Co. v. Robinson, supra.*) The evidence is sufficient to warrant the inference that, subsequent to that time, Potter did wrongfully aid and abet in securing and withholding the profits from the plaintiffs and, the trial court having drawn that inference, he is equally liable with the other defendants.

Defendants contend that, on August 26th, at the time defendants advanced the \$250 to be paid as a deposit on the option, Smith, Sr., entered into an agreement with the said defendants as to the division of profits and, therefore, plaintiffs cannot now claim all of the profits from the sale. However, any agreement which said plaintiff Smith, Sr., might have made at that time was not freely made, but was induced by the fraudulent representations and conduct of the defendants, and the agreement is thereby vitiated and not binding against the plaintiffs.

The judgment is affirmed.

Sloane, J., Shurtleff, J., and Lawlor, J., concurred.

[L. A. No. 6579. In Bank.—October 14, 1921.]

HARRY W. McNUTT, Appellant, v. THE CITY OF LOS ANGELES (a Municipal Corporation), Respondent.

[L. A. No. 6577. In Bank.—October 14, 1921.]

HARRY W. McNUTT, Respondent, v. THE CITY OF LOS ANGELES, Appellant.

- [1] STREET LAW—ACT OF 1913—JURISDICTION TO ORDER STREET IMPROVEMENT—GRADES.—The Street Improvement Act, as adopted in 1913, authorizes the physical improvement and change of grade of a public street independently of a concurrent establishment, change, or modification of the official or paper grade in the same proceeding; and a city council has jurisdiction to proceed under this statute with a view to contracting for street work in conformity to previously established grades.
- [2] ID.—AUTHORITY TO ESTABLISH GRADE FOR TUNNEL.—The Street Improvement Act of 1913 confers authority to establish a grade for a tunnel to be used as a public thoroughfare.
- [3] ID.—RESOLUTION OF INTENTION—DESIGNATION OF GRADE—REFERENCE TO PLANS AND SPECIFICATION.—A resolution of intention to improve a tunnel used as a public thoroughfare in a city is not insufficient, although not designating the grade upon which the work is to be done, where it provides that the work shall be constructed as shown on various plans and specifications referred to for more particular description and on file in the city engineer's office, as it will not be inferred that all the information required was not contained in such specifications, in the absence of a showing to the contrary.
- [4] ID.—NOTICE OF PROPOSED IMPROVEMENT—AFFIDAVIT OF.—Under the Street Improvement Act of 1913, the making and filing of an affidavit by the city clerk of mailing post-cards to the property owners within the assessment district containing the notice required by the statute of the proposed improvement, before the work is ordered, is mandatory and jurisdictional as affecting the power of the city council to pass an ordinance ordering the performance of the work; and such an affidavit is insufficient and the city council acquires no jurisdiction to order the work, where the affidavit refers to the location of the work proposed as, "for the improvement of Broadway tunnel," while the resolution of intention included the improvement of "Broadway tunnel between Temple Street and Sunset Boulevard, California Street between

North Broadway and Hill Street, North Broadway between Temple Street and California Street."

- [5] **JUDGMENTS—CONCLUSION OF LAW—APPEAL.**—An erroneous conclusion of law does not constitute a cause of reversal if the judgment is right.
- [6] **STREET LAW—UNLAWFUL CHANGING OF GRADE—ACTION FOR DAMAGES—INTEREST.**—In an action for damages against a city arising from the unlawful changing of the street grade in front of plaintiff's premises by the city, the claim being one for unliquidated damages does not draw interest before judgment.
- [7] **ID.—STATE OR MUNICIPALITY—INTEREST.**—As against a state or municipality thereof interest cannot be recovered except under special statutory authorization.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Affirmed.

The facts are stated in the opinion of the court.

Charles S. Burnell, Jess E. Stephens, Wm. P. Mealey and J. H. O'Connor for Appellant in L. A. No. 6577 and for Respondent in L. A. No. 6579.

Herbert Cutler Brown and Delphin M. Delmas for Appellant in L. A. No. 6579 and for Respondent in L. A. No. 6577.

**SLOANE, J.**—The plaintiff in this action recovered judgment against the city of Los Angeles, the defendant, in the sum of five thousand dollars for damages resulting from changing and lowering the grade of streets bordering on plaintiff's lot. Both parties have appealed from the judgment.

The defendant appeals on the ground that the street work complained of was done in conformity with the Street Improvement Act of 1913, and that plaintiff, having failed in such proceedings to make his claim for damages as required by the act, was not entitled to recover in this action.

The plaintiff appeals on the ground that he was entitled to interest upon the amount of his recovery, which was not included in the judgment.

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6. Right to interest on damages from change of grade of street, note, 28 L. R. A. (N. S.) 66.



The appeals will be considered together in this opinion.

It is conceded by the defendant that the plaintiff was entitled to recover damages unless the city of Los Angeles had jurisdiction to carry on the work complained of under the Street Improvement Act of 1913, [Stats. 1913, p. 954].

The plaintiff was the owner of a city lot at the northwest corner of the intersection of California Street and Broadway. A tunnel for street purposes had been constructed on Broadway in the year 1908 through a steep hill lying northerly from the intersection of the streets named. The southerly opening of the cut to the entrance of this tunnel, as originally established and constructed, appears to have been approximately upon the grade of plaintiff's lot.

The change for which damages are claimed consisted of cutting down the grade at the southern entrance of the tunnel and along plaintiff's land to a depth of upward of eighteen feet.

This tunnel was originally constructed under an act of the legislature approved March 19, 1889, and acts amendatory thereto, and in accordance with plans and specifications adopted by the legislative body of the city, and was accepted and thereafter used as a public way by the city for many years. There seems to have been no formal establishment of the grade for the floor of the tunnel at the time it was constructed.

It is alleged in the third amended complaint, the averments of which are stipulated and held by the findings to be true, that "on the ninth of July, 1912, the council of the city duly adopted an ordinance changing and establishing the grade of California Street and of North Broadway," and that the grades thus established are the grades to which Atkinson (the contractor with the city) reduced these streets by the work hereinabove mentioned. The complaint also alleges that on the 25th of March, 1913, the council adopted an ordinance establishing the grade of the Broadway tunnel, in conformity to the grade thereafter used and conformed to by said contractor.

At any rate, if any authority existed for changing the physical grade of the streets and tunnel adjacent to plaintiff's lot under the proceedings thereafter had, it was by action of the city council taken prior to and independently of the proceedings under the act of 1913.

Plaintiff states his grounds of objection to the work complained of as follows:

"1. (a) The legislative body of the city of Los Angeles had no power under the Street Improvement Act of 1913 to order the grading and improvement of California Street, or North Broadway tunnel, because the official grade of these streets, highways, or thoroughways had already been established before the passage of the ordinance of intention to order such grading and improvement (passed October 9, 1913), and, as appears upon the face of said ordinance, the grading and improvement of said streets, highways or thoroughfares was ordered to conform to the official grade thus theretofore established.

"2. The ordinance adopted by the legislative body of the city of Los Angeles on March 25, 1913, purporting to establish the grade of the Broadway tunnel was illegal and void. Thus, for the following reasons:

"(a) There was, at that time, no law of this state, and no provision of the charter of the city, which authorized that body to establish the grade of a tunnel used for purposes of public travel.

"(b) As appears by the facts found, the grade of the Broadway tunnel had been officially established in the year of 1898. In accordance with the official grade thus established the tunnel had been constructed, and upon that grade the public travel had passed for twelve years and more. No ordinance changing that grade could legally be adopted under the pretense of originally establishing an official grade, even if it were assumed that power existed either to establish or change the grade of such tunnel.

"3. The Street Improvement Act of 1913 has no application to such underground tunnels as was the Broadway tunnel; and, therefore, all the proceedings set forth in the findings of fact, so far as they affect that tunnel, are illegal and void.

"4. Were it conceded that under the Street Improvement Act of 1913 the legislative body of the city of Los Angeles was invested with the power to order done the improvements described in its ordinance of intention adopted on the eighth day of October, 1913, that body had no power, under the facts here found, to pass the ordinance ordering said work to be done. And this for the following reasons:

“(a) The city clerk never made or filed the affidavit required by section 3 of said act.

“(b) The affidavit which the clerk did make shows upon its face that the notices which he mailed did not conform to the requirements of said act.”

[1] A debatable question arises under the first objection above stated. Does, or does not, the Street Improvement Act as adopted in 1913 authorize the physical improvement and change of grade of a public street independently of a concurrent establishment, change, or modification of the official or paper grade in the same proceeding?

The language of such act as it stood when the work here was undertaken, so far as it has any bearing on this point, and eliminating for the sake of clarity portions of the text which have no relation to the point at issue, is as follows (Stats. 1913, p. 954 et seq.):

Section 1. “Whenever the public interest or convenience may require, the legislative body of any city is hereby empowered to *establish, or change, or modify the grade of any public street*, lane, alley, court, place, or right of way, in said city . . . *and . . . to order the whole or any part of such public street . . . to be improved to conform to such official grade.*”

Section 2. “Before ordering any establishment, change or modification of grade or any improvement described in section one herein, the said legislative body shall pass an ordinance or resolution declaring its intention to do so . . . *designating the proposed grade*, describing the proposed improvement, fixing a time and place for the hearing of protests . . . and specifying the exterior boundaries of the district of land to be benefited by said improvement.”

Section 5. “If no protests are filed . . . or if protests are filed and after hearing are denied . . . the legislative body shall have jurisdiction to order the establishment, change or modification of grade *and* the improvement described in the ordinance or resolution of intention. Having acquired such jurisdiction it shall by ordinance or resolution order the establishment, change or modification of grade *and* such improvements to be made.”

Section 46. “The term improvement includes the establishment, change or modification of grade, if any, and all of the improvements mentioned in section one of this act.”

The title to this act declares it "An act for the establishment and change of grade of public streets . . . and providing for the improvement thereof, in cases where any damage to private property would result from such improvement."

The italics used in the foregoing quotations are supplied to emphasize the construction contended for by plaintiff.

In defining the scope and purpose of this act it is apparent that all references to change of grade and improvement work are made conjunctively. The only constructive basis for a different interpretation is the use of the term "if any," in section 46, referring to the preceding words "establishment, change, or modification of grade."

Counsel for the appellant argue that if a concurrent establishment or change of grade was an essential and prerequisite condition in every instance to any physical improvement of a street, under this act, the expression "if any" could find no place or significance in the application there given to the word "improvement."

There is force in the suggestion. The word "improvement," as used in the act, is designed to cover proceedings which authorize the physical grading of the street, and a concurrent change of the official grade, "if any."

But a more potent reason for such construction comes from a consideration of the history of this act. The legislature of 1909 enacted two separate measures for street improvement, one known as the Change of Grade Act (Stats. 1909, p. 1018), which provides a procedure for changing the official or paper grades of streets, without any concurrent physical work thereon, and the other known as the Hammond Act (Stats. 1909, p. 1042), which established a proceeding for actual street work where the grades were already established. But no provision was made in either act for a condition where it might be desirable to change or establish a grade and authorize the work of improvement concurrently.

Construed as appellant contends for, the Street Improvement Act of 1913 here under consideration very sensibly remedies this omission by permitting in the same proceeding the governing body of a city to take proceedings for the physical grading and improvement of a street, and at the

same time where there was no official grade, or a change of grade was desired, to establish such grade.

The act of 1913, it will be seen by comparison, while it repeals the Hammond Act of 1909, is a substantial re-enactment thereof, with the incorporation of the provision for establishing or changing the grade concurrently where such need exists; and the manner in which the amendment of the statute is made and the obvious reasons therefor would indicate that it was not intended to change the operation of the law in cases where grades were already established, but merely to supplement the former provision by allowing concurrent changes of grade where required, without the necessity of a separate and independent proceeding.

It is true that the act of 1913 is at least open to the criticism of being ambiguous and uncertain as to its interpretation in this respect. The legislature has apparently fallen into the error so common in legal parlance of using the conjunctive article "and" where the disjunctive "or" is intended. But this can be disregarded if the obvious purpose of the act and the intention indicated by other phraseology justify it.

It is strongly insisted by respondent that the subsequent amendments to section 1 of this act show the legislative interpretation to have been that the statute did not in its original form authorize actual grading work, except where the official grade was changed or established in the same proceeding.

Section 1 of the act of 1913 was amended in 1915 (Stats. 1915, p. 1217) by adding a proviso "that wherever the official grade of any such public street . . . has been theretofore established, changed or modified in any manner authorized by law, the legislative body of said city may order such public street . . . to be improved under the provisions of this act."

The conclusion urged by respondent does not necessarily follow. It is often the function of an amendment to remove just such uncertainty and ambiguity as it is claimed exists here, by expressing the point involved in obscurity in language that cannot be misunderstood (*Independent School Dist. v. Kelley*, 120 Iowa, 119, [94 N. W. 284]; *Alexander v. Mayor of Alexandria*, 5 Cranch, 1, [3 L. Ed. 19, see, also, Rose's U. S. Notes]).

It is obviously the part of reason and common sense that the legislature should have intended by the original enactment of the act of 1913 to supplement the law as announced in the Hammond Act of 1909, by extending its scope to apply to the improvement of streets where an establishment of grade has not already been made, by providing a concurrent procedure for that purpose where needed, rather than to limit its application alone to streets where such concurrent change of grade is required, and every intentment of the statute should be applied to the broader construction.

We are of the opinion, therefore, that the city council had jurisdiction to proceed under this statute with a view to contracting for the work complained of in conformity to previously established grades.

There is no sufficient justification for the collateral attack in this action upon the regularity and validity of the proceedings under which the official grades of the Broadway tunnel and California Street and North Broadway were established.

The complaint itself alleges that the grades on California Street and North Broadway to which the contractor conformed were duly adopted by an ordinance of the council on the 9th of July, 1912. As we gather from the record, no part of the tunnel proper was upon or contiguous to the property of plaintiff. That part of the street lying along the North Broadway side of plaintiff's lot, as we understand, was occupied by the cut complained of leading to the southerly opening of the tunnel.

So far as damage to plaintiff's land is concerned, the change of grade of the tunnel is not material. It is only as the right to lower the floor of the tunnel affects the jurisdiction of the city to proceed in the matter does it become significant. The complaint also alleges the adoption of an ordinance on the 25th of March, 1913, establishing the grade to which the contractor later lowered the floor of the tunnel, and also sets out such ordinance as exhibit "C" of the complaint.

Nothing appears in the complaint attacking the regularity or validity of the proceeding for the adoption of these ordinances.

[2] The objection that there was no authority under the Street Improvement Act of 1913 to establish a grade for a tunnel to be used as a public thoroughfare is not pressed in respondent's brief. In any event, we think the act sufficiently authorizes tunnel work. Section 1, in authorizing streets to be improved to establish grades, includes as part of the authorized work the construction of "culverts," "bridges," and "tunnels." The construction of a bridge over a chasm or the boring of a tunnel through an obstructing hillside would be integral parts of the actual highway improvement and not a mere accessory structure. (*Bailey v. Hermosa Beach*, 183 Cal. 757, [192 Pac. 712].) In the case of *Thompson v. Hance*, 174 Cal. 572, [163 Pac. 1021], which held that tunnel construction was not authorized under the Vrooman Act as amended in 1911, the court was considering a statute which only mentioned tunnels as obviously intended for drainage purposes in connection with the street, the reference being to "tunnels, sewers, ditches . . . conduits and channels for sanitary and drainage purposes."

[3] Plaintiff further attacks the jurisdiction for this procedure on the ground that the resolution of intention did not designate the grade upon which the work on the tunnel was to be done. The act of 1913 provides that before ordering any street work under such act the legislative body of the city "shall pass an ordinance or resolution declaring its intention to do so . . . designating the proposed grade." It may be questioned if the requirement to designate "the proposed grade" applies where the grade is already established, but rather refers to proceedings where an establishment or change of grade is contemplated concurrently with the physical improvement of the street. The Hammond Act of 1909, upon which we have seen the present act is based and which only dealt with street improvements where the grades were already established, did not direct any reference to the grade in the resolution of intention. In other words, in this proceeding there was no "proposed grade," the grade having been previously established.

This resolution does, however, provide that the work shall be constructed as shown on various plans and specifications referred to for more particular description, and on file in the city engineer's office.



It is not alleged in the complaint, does not affirmatively appear from the resolution itself, and is not found by the court, that all the data required to be shown were not contained in the plans and specifications referred to.

If this reference makes the specifications a part of the resolution of intention, we cannot infer that all the information required was not contained in such specifications.

In *Chase v. Trout*, 146 Cal. 350, 368, [80 Pac. 81], Mr. Justice Shaw writing the opinion, it is held that a reference to plans and specifications on file will serve to make sufficient the description of the work in a resolution of this character where by the terms of the description in the resolution itself it would be void, and that it is not required that such plans and specifications should be published as part of the resolution.

In the case before us counsel for plaintiff recite in their notice of motion for judgment in plaintiff's favor on the findings that it appears upon the face of the ordinance that "the grading and improvement of said streets and highways or thoroughfares, was ordered to conform to the official grade thus theretofore established."

[4] Another and more serious objection to the validity of these proceedings under the Street Improvement Act of 1913 is the alleged failure of the city clerk to make an affidavit before the work was ordered that he had mailed postal cards to the property owners within the assessment district containing the notice required by the statute of the proposed improvement.

Section 3 of the act requires that the city clerk shall immediately upon the passage of the resolution of intention mail to each of such property owners a postal card giving notice of the passage of the resolution of intention, "the name of street to be improved and between what streets located." It is then further provided as follows: "The city clerk shall immediately upon the completion of the mailing of such cards file in the office of the superintendent of streets an affidavit setting forth the time and manner of his compliance with this requirement, provided, that the failure of the city clerk to address such cards or any of them to the true owners of said property, or to mail said cards, or the failure of the property owners to receive the same, shall in no wise affect the validity of the proceedings or prevent

the legislative body from acquiring jurisdiction to order the work; provided, however, that the legislative body shall not pass any ordinance or resolution ordering the work until such affidavit is made and filed as herein prescribed."

The making and filing of this affidavit is mandatory and jurisdictional as affecting the power of the city council to pass an ordinance ordering the performance of the work. The reservation made in the proviso, that failure in fact in properly addressing or mailing or delivering said cards shall in nowise affect the validity of the proceedings, is clearly intended to avoid the uncertainty and complication that would inevitably arise if the proceeding could be attacked for failure to reach any one or several of the interested property owners with such cards, by making the affidavit conclusive evidence of the facts alleged; but the negative provision contained, that such failure in the actual making and delivery would not invalidate the proceedings or destroy jurisdiction, coupled with the final proviso that the legislative body "shall not pass any ordinance or resolution ordering the work until such affidavit is made and filed as herein prescribed," emphasizes the intention of the legislature to make such affidavit a condition of jurisdiction to take further action.

There was an affidavit made and filed in this instance. The vital question is: Did it meet the substantial requirements of the statute? Obviously, an affidavit by the clerk that he had mailed notice of intention to pave the Appian way would not suffice in this case. In order to conform to the requirement of the statute the affidavit must show that the notice mailed was in compliance with the requirements of the law. When this is done the affidavit becomes conclusive evidence that such notice was properly directed, mailed, and delivered, but the notice itself must, of course, conform to the statute.

The notice which the clerk did make affidavit that he had mailed was as follows:

"Los Angeles, Cal., Oct. 22, 1913.

"You are hereby notified that on the 9th day of October, 1913, the legislative body of the city of Los Angeles, California, by virtue of the street improvement act of 1913, passed an ordinance (resolution) of intention numbered 28,413—(New Series)—for the improvement of Broadway

tunnel. Protests will be heard on the 19th day of November, 1913, at the hour of 9 o'clock A. M. in the council chamber of said city.

"Your property is in the district to be assessed for this improvement.

"CHAS. L. WILDE,  
"City Clerk."

Three distinct improvements were included in the resolution of intention—Broadway tunnel between Temple Street and Sunset Boulevard, California Street between North Broadway and Hill Street, North Broadway between Temple Street and California Street.

In the notice certified to by the affidavit the only reference to the location of the work proposed is in the words "for the improvement of Broadway tunnel." Is this the notice called for by the statute and required to be certified to in the affidavit?

The change in the streets for which plaintiff claimed damages was not in the Broadway tunnel but on North Broadway and California Street. He may have been indifferent to improvements to be made in the tunnel and willing to bear his portion of the assessment therefor without further investigation. The law required specific notice of the work proposed on these other streets. There was nothing in the notice certified to that can be said to have put a property owner on inquiry as to the inclusion of any other work than the improvement of the tunnel, and there was nothing on the face of the notice to suggest that the proposed improvement would extend to property in the other localities. If there had been it might well be said that the property owner was put on inquiry and should have gone to the records for particulars.

That it was not the legislative purpose to make reference to the resolution of intention to help out the notice in question is indicated by the provision of section 44 of the act that in "all resolutions, notices, orders and determinations subsequent to the notice of street work a description of the work by reference to the ordinance or resolution of intention shall be sufficient." This notice was not subsequent but prior to, or at least concurrent with, the notice of street work.

The decision of the court of appeal, *Beale v. City of Santa Barbara*, 32 Cal. App. 235, 243, [162 Pac. 657], cited by

counsel for appellant, does not apply here, for the reason that such affidavit of mailing postal notices there involved was not made a condition precedent to ordering the work, under the Vrooman Act as then in force, which was under consideration in that case.

Neither is there room for application of the rule referred to in *Bailey v. Hermosa Beach*, 183 Cal. 757, [192 Pac. 712], that jurisdiction does not depend upon record evidence or affidavit of notice, but upon the fact of notice.

In this case the statute makes the affidavit of mailing the exclusive and conclusive proof of the fact of notice, and there is no allegation or offer of other proof that the law was complied with. In fact, the affidavit itself contains the proof that the notice mailed was not the notice required by the statute.

We see no escape from the conclusion that in this absence of a substantial compliance with the law relating to the mailing of such notice there was a failure of jurisdiction to order the street improvements from which plaintiff's claim for damages arose.

It follows that plaintiff was not estopped by such attempted proceedings from pursuing his relief in this action.

In view of the conclusion thus reached upon the merits of this proceeding it is perhaps unnecessary to pass upon plaintiff's objection that the appeal was not properly taken.

We have not heretofore referred to the fact that judgment in this action was originally for the defendant, and that such judgment was vacated and a judgment on the findings entered for plaintiff, in pursuance of a motion under section 663 of the Code of Civil Procedure. The appeal is from this final judgment, and it is the contention of plaintiff that it should have been from the order directing the new judgment. Without discussing the merits of the question thus raised, it is sufficient for the purposes of this decision that a motion to dismiss this appeal on the grounds stated was heretofore presented to this court and denied.

The circumstances attending the rendition of the new judgment, however, become material in the consideration of the appeal taken by plaintiff.

The prayer of the third amended complaint was that plaintiff recover judgment for five thousand dollars damages, with interest thereon from the first day of September, 1915.

In granting the motion vacating the first judgment for defendant and directing judgment for the plaintiff, the order of the court recites as follows: "The plaintiff's motion to set aside and vacate the judgment (based upon findings of fact made by the court) heretofore rendered against him and entered on the twenty-fourth day of December, 1919, and to enter upon said findings a judgment in the plaintiff's favor in accordance with the prayer of his third amended complaint, filed here on the 24th of November, 1919, came on regularly to be heard on the twentieth day of January, 1920, the parties appearing by their respective counsel, whereupon, after argument heard from both sides, the court being duly advised, grants said motion and orders that judgment be entered accordingly."

The judgment thereafter made and entered, after reciting the foregoing order, decrees as follows: "Wherefore, it is now ordered, adjudged, and decreed that the conclusions of law heretofore announced be amended and corrected by striking out said conclusions as the same now appear in the findings of fact and conclusions of law and substituting in lieu thereof the following: As conclusions of law from these facts the court decides that the plaintiff is entitled to judgment according to the prayer of his third amended complaint. And it is further ordered, adjudged, and decreed that the judgment heretofore entered herein on the twenty-fourth day of December, 1919, be and the same is hereby set aside and vacated, and that the plaintiff do have and recover from the defendant the sum of five thousand dollars together with his costs."

Thereafter, on the ninth day of April, 1920, judgment was entered for the plaintiff for five thousand dollars damages, but without interest. Plaintiff at the time objected to the entry of a judgment without interest as not being in accord with the order of the court directing such judgment, but the court overruled the objection and caused the judgment to be entered without interest, to which ruling plaintiff excepted.

No question is raised by the defendant as to the regularity of the proceedings on the motion under section 663 of the Code of Civil Procedure. The new judgment is, therefore, to be considered precisely as though it were founded on original findings of fact and conclusions of law.

Plaintiff's rights in the premises are to be measured by the findings of fact rather than the conclusions of law, and if the facts do not entitle him to interest, he is not prejudiced by the judgment.

The trial court, under section 663 of the Code of Civil Procedure, still had jurisdiction to further amend its conclusions of law if they did not conform to the findings of fact. This, perhaps, would have been the consistent course, but if under the findings of fact plaintiff is not entitled to recover interest, he would not be entitled to relief on this appeal. [5] An erroneous conclusion of law does not constitute a cause of reversal if the judgment is right. (*Spencer v. Duncan*, 107 Cal. 423, [40 Pac. 549]; *Helm v. Duncan*, 3 Cal. 454; *Bleven v. Freer*, 10 Cal. 172.)

As has already been shown by the record, this judgment was for damages arising from the unlawful changing of the street grade in front of plaintiff's premises by the city of Los Angeles.

[6] The claim sued on was unliquidated and could not draw interest before judgment even as against an individual defendant. (*Perkins v. Blauth*, 163 Cal. 782, [127 Pac. 50]; *Cox v. McLaughlin*, 76 Cal. 60, [9 Am. St. Rep. 164, 18 Pac. 100].)

[7] As against the state or a municipality thereof interest cannot be recovered except under special statutory authorization. (*Engbretson v. City of San Diego*, 185 Cal. 475, [197 Pac. 651]; *Savings & Loan Society v. San Francisco*, 131 Cal. 356, 363, [63 Pac. 665].)

The appeal by plaintiff is, therefore, also without merit.

The judgment is affirmed.

Lennon, J., Lawlor, J., Shurtleff, J., and Angellotti, C. J., concurred.

[L. A. No. 6256. In Bank.—October 14, 1921.]

S. J. PARSONS, Respondent, v. ANNIE DELL SEGNO,  
Appellant.

- [1] **ACCOUNT STATED—WHAT CONSTITUTES.**—An account stated is an agreement between both parties that all the items of the account are true, which agreement need not be express but may be implied from circumstances.
- [2] **ID.—SUFFICIENCY OF EVIDENCE.**—Where the creditor rendered his account to the debtor on a certain date, after which the latter paid several amounts for which the former gave her credit and ten months afterward mailed her another account, the first item of which was the balance shown by the previous statement, to which latter statement of account the debtor made no objection and after the amount claimed to be due was demanded stated she would settle the account and offered to give her note for it, there was an account stated.
- [3] **ID.—SURCHARGING AND FALSIFYING ACCOUNT—FRAUD OR MISTAKE —PLEADING.**—In order to surcharge and falsify an account stated on the ground of fraud or mistake, the facts constituting the fraud or mistake must be pleaded, a reopening of the account asked for, and the proof must be confined to the allegations of fraud or mistake.
- [4] **ID.—VOID CONTRACT—REPUDIATION OF—CLAIM OF FRAUD.**—In an action upon an account stated, where the only assignment of fraud was the alleged inclusion in the account of a demand based upon a void contract for a contingent fee in a divorce suit, but there was evidence from which the court could have found the void contract was repudiated by the parties and a new one entered into in lieu thereof, the claim of fraud is not sustained.
- [5] **APPEAL — ASSIGNMENTS OF ERROR — INSUFFICIENCY OF.**—Assignments of error to findings "on the ground that the court would not allow any evidence on those issues," with a mere reference to the transcript on appeal for certain rulings of the court on the admission and rejection of testimony, but without attempt to print in the briefs those portions of the record, or to show wherein the errors, if any, lie, do not conform to the requirements of section 953c of the Code of Civil Procedure.

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1. What constitutes an account stated, notes, 62 Am. Dec. 85; 136 Am. St. Rep. 37; 27 L. R. A. 811.

4. Illegal character of original transaction as defense to an action on account stated, note, 45 L. R. A. (N. S.) 539.



APPEAL from a judgment of the Superior Court of Los Angeles County. Dana R. Weller, Judge. Affirmed.

The facts are stated in the opinion of the court.

Alfred E. Putnam and Will D. Gould for Appellant.

S. J. Parsons, *in pro. per.*, for Respondent.

LAWLOR, J.—This is an appeal by the defendant from a judgment in favor of the plaintiff for \$3,509.11 and costs, being the full amount demanded in an action in three counts to recover the sum of \$250, with interest, on each of two promissory notes signed by the defendant, as maker, and the sum of \$2,160.61, with interest, on an alleged account stated.

In June, 1911, appellant retained respondent as her attorney for the purpose of bringing an action for divorce against her husband, A. Victor Segno, effecting a property settlement with him, and looking after other legal business for her. The divorce was granted and the property divided. In the course of handling her affairs, aside from the divorce action and the property settlement, respondent appeared as her attorney in the trial of certain other cases, organized a corporation for her, and otherwise assisted in the conduct of her affairs. At the time appellant retained respondent, they entered into an agreement in writing whereby appellant agreed to give respondent seven per cent of all the property she received from her husband under the settlement. According to the evidence, the value of this property was never definitely ascertained. It is not disputed that this contract was void as against public policy, being a contract for a contingent fee in a divorce action (*Newman v. Freitas*, 129 Cal. 283, [50 L. R. A. 548, 61 Pac. 907]), but both parties testified they were unaware of the illegality of the contract at the time. Respondent testified that this contract was repudiated, and a new agreement arrived at after the divorce was granted, whereby he was to receive five thousand six hundred dollars, or seven per cent on eighty thousand dollars, which he asserted they both agreed should be assumed to be the value of the property received from the husband. Appellant testified respondent

made an offer to her of such a proposition, but that she never agreed to it. It is this asserted second contract which respondent contends is the basis of his claim.

Respondent charged appellant additional sums for the services he performed for her after the divorce was granted and the property settlement concluded. From time to time she paid him varying amounts of money to apply on the total bill. In June, 1913, she gave him the two notes for \$250 each, one payable to him, and one to his wife, to apply on the account, on which notes it was agreed respondent was to borrow money.

Respondent sent appellant several statements of account and letters asking her to make him payments. On November 1, 1913, he sent her a statement of account, the first item of which was "Bill as per agreement, \$5,600.00," and according to the account the total amount due on that date was \$1,286.21. This balance was never objected to by appellant prior to the trial. Ten months later, September 1, 1914, he sent her another account which he insists constituted an account stated. The first item of this account was the balance of \$1,286.21 shown by the account of November 1, 1913. Then followed charges and payments showing a balance of \$2,160.61 due on September 1, 1914. To this statement of account respondent received no reply, although he wrote appellant on December 19, 1914, inclosing a copy thereof, and on February 1 and 12, 1915, concerning it.

In 1915 respondent assigned the notes referred to, and the account as represented by the statement of September 1, 1914, to one Fred O. Ricketts, who commenced suit on them. According to the testimony of Neil S. McCarthy, respondent's attorney in that action, while the suit was pending appellant promised to pay the amount demanded, and to give her note for it. A demurrer was interposed and sustained. On June 30, 1915, on motion of plaintiff, the case was dismissed. After the dismissal the notes were reassigned to respondent by Ricketts, and this action followed. The notes constitute the causes of action in the first two counts, and the statement of account of September 1, 1914, alleged to be an account stated, the cause of action in the third count.

As defenses to the notes, appellant pleaded the statute of limitations, that the action brought by Ricketts was a bar to this one, that the notes were for the purpose of enabling

respondent to borrow money, which he failed to do, that as a result of such failure appellant was not liable on them, and that there was no consideration for the note given to respondent's wife. As a defense to the alleged account stated, appellant pleaded the statute of limitations, the action by Ricketts as a bar, and specifically denied the allegations of the complaint that the account was stated. In a cross-complaint appellant alleged respondent had received \$3,318.86 for the use of appellant and in trust for her, and prayed judgment for that amount. In a counterclaim appellant alleged that the agreement between herself and respondent was void, and set it out *in haec verba*. She also alleged that she had paid respondent \$4,512.36, \$3,318.86 of which was paid under the void agreement before she knew it was void, and prayed judgment for the latter amount.

The court found in favor of respondent on all three counts, that the allegations of the answer, counterclaim, and cross-complaint were untrue, and that the amounts respondent demanded were due and owing to him.

Appellant states: "If this court should hold that the plaintiff rendered an account stated and thereby bound his client, we shall not expect a reversal of the judgment, however harsh and unjust it may be. . . . Mrs. Segno, the defendant, is not learned in the law and was not informed by the plaintiff that he was presenting to her an account stated and she was not informed of her rights and privileges in the matter; and we think sufficient objection was made to the account when presented." It is also stated: "In this case the attorney cannot bind his client by giving to her an account stated of which she had no knowledge as to its legal effect or as to any formal requirements of objections." Respondent insists there was a valid account stated, that the evidence supports the finding to that effect, and that there was no error in the rulings of the court.

1. We shall first consider the question of whether there was an account stated. In support of her position that respondent could not bind her by an account stated, appellant cites no authority.

[1] In *Auzerais v. Naglee*, 74 Cal. 60, 63, [15 Pac. 372], it was said: "A stated account is an agreement between both parties that all the items are true; but this agreement

may be implied from circumstances, as where merchants reside in different places, and one sends an account to the other, who makes no objection to it within a reasonable time. (*Stebbins v. Niles*, 25 Miss. 267; 1 Wait's Actions and Defenses, 191-198.)

"In such cases, the action is based upon the agreement, which has all the force of a contract. The original account becomes the consideration for the agreement, and it is not necessary to prove the items of such account; nor can they be inquired into or surcharged except for some fraud, error, or mistake, and such grounds must be, according to the weight of authority, set forth in the pleadings. [Citing cases.] . . .

"The term 'stated account' is but an expression to convey the idea of a contract, having an account for its consideration, and is no more an account than is a promissory note, or other contract, having a like consideration for its support."

In *Terry v. Sickles*, 13 Cal. 427, the court declared: "In support of an action upon an *account stated*, it is necessary to show that there was a demand in favor of the plaintiff, which was acceded to by the defendant. But the admission of the correctness of the demand need not be express and in terms. If the account be sent to the debtor and he do not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated. . . . The evidence in relation to the amount of the account was properly excluded. It is not alleged in the answer that there was any fraud or mistake in the original accounting."

In *Crane v. Stansbury*, 173 Cal. 631, [161 Pac. 7] the plaintiff sued as the assignee of an attorney upon an account based on charges for professional services rendered. It was contended by the defendant that the fees of an attorney could not be the subject of an account stated. The court said: "The bill of an attorney for services, like any other bill, may, under proper circumstances and conditions, be the subject of an account stated." The court continued: "The court instructed the jury that when an account was rendered it became the duty of the recipient to make his objections thereto within a reasonable time, and that, if he did not do so, the account became an account stated and the foundation of an independent cause of action based upon

the account stated; also that silence and nonobjection under the circumstances of this case for six months would constitute an unreasonable time. Exception is taken to these instructions. But the complaints made against them are not well founded. They are unimpeachable in point of law." It was also held that "While all questions of fraud and mistake in combating the force of an account stated are questions of fact for the jury, where assent is based upon acquiescence arising from a failure to object, the length of time which must pass before an account rendered becomes, by virtue of the recipient's failure to object, an account stated, is one of law for the court." In *Lane & Bodley Co. v. Taylor*, 80 Ark. 469, [7 L. R. A. (N. S.) 924, 97 S. W. 441], an attorney sought to reopen an account stated. The court declared: "When an attorney makes a charge for services, and the same is accepted by the client, it becomes an account stated between them, and may be sued upon as such by him. *Wilcox v. Boothe*, 19 Ark. 684; *Pulliam v. Booth*, 21 Ark. 421." (See, also, 1 C. J. 696, 703; *Bennett v. Potter*, 180 Cal. 736, [183 Pac. 156]; *Crawford v. Hutchinson*, 38 Or. 578, [65 Pac. 84]; *Beals v. Wagener*, 47 Minn. 489, [50 N. W. 535]; *Gruby v. Smith*, 13 Ill. App. 43.)

[2] According to the evidence, after the account of November 1, 1913, was rendered, appellant paid respondent several amounts, for which he gave her credit; following this the account of September 1, 1914, was mailed to her, the first item of which was the balance shown by the statement of account of November 1st, and to this statement of account of September 1st appellant made no objection. When appellant was under cross-examination by respondent, she testified: "After that [referring to the divorce action and the property settlement] you had some seven or eight actions for me, and that account included what you did for me for a number of years. I didn't dispute the correctness of the bill; I thought the contract was high, Mr. Parsons." Neil S. McCarthy testified: "Mrs. Segno came to the office, introduced herself, and to the best of my recollection said you [respondent] had sent her in there. This was after the suit was filed. She said she couldn't pay up at that time, but would give a promissory note for it for the entire amount. I told her that if she would give some security

for the promissory note that it would be satisfactory to you. I do not recall what answer she made. However, she never gave the note to me, nor the security, nor anything else."

The evidence also shows that the relationship of attorney and client had existed between the parties from 1911 to 1915—the year the Ricketts action was brought; that during that period they discussed his compensation and had some correspondence concerning it; that they agreed he should receive for his services in the divorce action and property settlement five thousand six hundred dollars; that he reported to her the various expenses he incurred for filing fees, traveling expenses, and the like, and charges for services; that she made no objection; that the statements of account of November 1, 1913, and September 1, 1914, and the two letters of February 1 and February 12, 1915, were clear and explicit as to his claim; that between the rendering of the two statements of account she made payments without in any way questioning the correctness of the account; that appellant had a great deal of experience in business; that she conducted an enterprise—the "American Institute of Mentalism"—which yielded at one time, according to her own testimony, "anywhere from five to twenty-five hundred gross per month"; and that she had figured in litigation besides the divorce action and the case at bar.

We must assume in favor of the judgment that the court decided from the evidence, which is amply sufficient to support such a conclusion, that appellant did not misunderstand the import of the statements of account and respondent's letters, and that she realized he was demanding the amount of the balance shown by the statement of account of September 1, 1914. As shown by the evidence there was a lapse of several months after this statement of account was rendered, during which time respondent received no word from appellant; that she never disputed the correctness of the account, and that after the amount claimed to be due was demanded she said she would settle and offered to give her note for it. In our opinion it cannot be maintained that there was not evidence from which the court could have found that an account was rendered, assented to, and became an account stated.

2. Appellant next contends: "We submit that an attorney cannot receive money in a divorce case, on a void agreement.

against public policy, and keep the money in fraud of his client, and cover his tracks by presenting an account stated to his client for further demands, and in this case, plead an account stated and thereby bind his client." In *Gruby v. Smith, supra*, the court held: "The fact that the relation of attorney and client subsisted between the parties, at the time of this alleged assent to a grossly exorbitant bill and promise to pay such a balance, should have had an important, if not controlling, effect upon . . . the point of permitting an investigation by him into the merits of the several items of the bill." It was said in *Beals v. Wagener, supra*, that "The court would probably scrutinize such an agreement [an account stated between an attorney and his client] closely, to see that there was no overreaching, and that the client acted with as full and candid information as the attorney can give him." [3] But in order to surcharge and falsify an account stated on the ground of fraud or mistake the facts constituting the fraud or mistake must be pleaded, a reopening of the account asked for, and the proof must be confined to the allegations of fraud or mistake. (*Auzerais v. Naglee, supra*; *Terry v. Sickles, supra*; *Branger v. Chevalier*, 9 Cal. 353; 1 Ency. of Evidence, 147.) The answer here is a general denial, and neither mistake, fraud, nor any other ground touching the account stated is alleged. The counterclaim merely alleged that the original agreement was void; that the sum of \$3,318.86 was paid thereunder, and prayed for a recovery of that amount. The cross-complaint alleged only that said amount had been paid by appellant to respondent for her use and for her benefit, and prayed for judgment accordingly. It is clear, therefore, that there is no direct allegation of fraud, nor are any facts pleaded upon which a finding of fraud could be predicated.

However, assuming that the asserted fraud was pleaded, that the reopening of the account stated was asked for, and that evidence was offered to support such a charge, still there is ample evidence from which the court could have concluded that the void contract was repudiated by the parties, and the second contract for compensation substituted. No claim is made that the latter contract was invalid. Appellant testified: "I had conversation with him *after this matter was concluded* in regard to his compensation for



the work he had done. He asked me what I thought would be fair as a settlement, and I said, 'Mr. Parsons, I don't know.' He asked me if I thought seven per cent on a value of eighty thousand dollars would be equitable, and I said I didn't know, because I could get no basis of value on the properties that I received; it was left open that way." On the other hand, respondent testified: "Q. The account you rendered included what this contract called for up to the point that it was paid for, did it not? A. No, that is not true. Q. Does not the account on its face show— A. After the settlement with her husband in which she obtained, as she claimed, one hundred and fifty thousand dollars or two hundred thousand dollars' worth of property, she repudiated that contract, and said that she would not settle on the terms of it, but that she would—I finally asked her what she would pay me, and she said that she would give me seven per cent on eighty thousand dollars, and that she was perfectly satisfied to call the amount for that particular service five thousand six hundred dollars, and we settled on those terms. She repudiated the contract entirely." At the trial, the following colloquy occurred: "Mr. Putnam: When you were first sued on the assignment made here to Mr. Ricketts, *Ricketts v. Segno*, they sued on the contract, didn't they, the same contract? Mr. Parsons: I object to that as calling for a conclusion, if your Honor please; the record is the best evidence. The Court: You repudiated it then, didn't you? A. No, your Honor. Mr. Putnam: The court found it void. The Court: She pleaded the invalidity of it. It just goes to show how much effect you get out of testimony that a thing is or is not repudiated. Now, the witness has testified that she never repudiated that contract. I find that she did, because she pleaded its invalidity."

The first item in the account is the charge of five thousand six hundred dollars for the original service, and this is the amount respondent testified was agreed upon for such service after the original contract was repudiated. The fact that this sum was included in the statement of account of November 1, 1913, suggests that the court, as indicated by the remark it made during the above colloquy, concluded that the original contract was repudiated by appellant. In other words, such a finding is to be implied from the finding

that an account was stated. That the second contract was a new agreement and that the old one was repudiated by both parties is further borne out by the fact that appellant testified that Mr. Segno, in the trial of another action, stated that the property appellant received from him was actually worth from one hundred and fifty thousand dollars to two hundred thousand dollars. As already pointed out, appellant's only assignment of fraud is the alleged inclusion by respondent in the account stated of the demand based upon the void contract. [4] Since this was the only assignment of fraud, and there was evidence from which the court could have found the void contract was repudiated by the parties, and a new one entered into in lieu thereof, appellant's claim of fraud cannot be sustained.

3. Appellant further contends that "The court erred in not allowing defendant to show that \$4,512.36 paid to the plaintiff was the basis of all accounts rendered and was included in the purported account stated, and in finding [finding 3] that the defendant became indebted upon an open account, etc., while the evidence shows that there was a written agreement which was against public policy and void." No particular evidence is referred to under the first point as having been improperly excluded, and it is not stated that appellant made any offer to prove that the said sum formed the basis of all the accounts upon which the balance shown by the account stated was struck. Concerning the asserted error in finding 3, we have already stated there was evidence from which the trial court could have found the original contract to have been repudiated and another substituted. The evidence shows the account to have been open and current, for items were added and credits given from time to time.

Error is assigned to finding 7 upon the ground that it is not supported by the evidence. This finding is to the effect that the sum of \$2,660.61, with interest and costs, is owing to respondent. As heretofore stated, the evidence on the subject of the account stated was sufficient to support the findings, and upon this hypothesis the amount of \$2,160.61 is correct. Appellant does not object to the findings as to the promissory notes, which make up the other five hundred dollars. These notes were admitted in evidence, thus supporting the finding of the court as to the amount due thereon.

Error is assigned to the conclusions of law, which are to the effect that the said amount of \$2,660.61, with interest and costs, was owing to respondent, but from what we have already said it follows there is no merit in this contention.

Appellant assigns error to findings 4, 5, and 6, "on the ground that the court would not allow any evidence on those issues." On this assignment of error we are merely referred to the transcript on appeal for certain rulings of the court on the admission and rejection of testimony, but no attempt has been made to print in the briefs these portions of the record, or to show wherein the errors, if any, lie. [5] Such an assignment of error does not conform to the requirements of section 953c of the Code of Civil Procedure, and hence does not call for consideration. The same disposition is to be made of appellant's further contention that "There are other questions involved in this appeal, particularly set forth in the assignment of error to which we beg leave to refer without reprinting." This has reference to some seventeen specifications of error in appellant's motion for a new trial.

Judgment affirmed.

Wilbur, J., Sloane, J., Lennon, J., Shurtleff, J., and Angellotti, C. J., concurred.

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[L. A. No. 6177. In Bank.—October 19, 1921.]

LAURA STARR, Respondent, v. LOS ANGELES RAILWAY CORPORATION (a Corporation), Appellant.

[1] NEGLIGENCE—PERSONAL INJURIES—PLEADING—INCONSISTENT DEFENSES.—A defendant has a right to make inconsistent defenses, and he does so in an action for damages for personal injuries where in the first count of his answer he specifically denies the charge of negligence set forth in the complaint and in his second count alleges contributory negligence of the plaintiff.

[2] ID.—INSTRUCTIONS — POSITION OF CONDUCTOR ON CAR — QUESTION OF FACT.—In an action for damages for personal injuries sus-

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2. Presumption of negligence from sudden start, stop, jerk, or jolt of car, notes, 13 L. R. A. (N. S.) 611; 29 L. R. A. (N. S.) 814; L. R. A. 1916C, 373.

Negligence on starting street-car with jerk while passenger is alighting, notes, 23 L. R. A. (N. S.) 891; 34 L. R. A. (N. S.) 225.

tained in falling from a "pay-as-you-enter" street-car, where the complaint counts upon the negligence of the company in suddenly starting the car with a jerk while the plaintiff was alighting, and there is no general allegation of negligence, an instruction that if the conductor knew that the plaintiff was about to alight and that the alighting place was dangerous because the car was traveling at a fast rate of speed and would necessarily give a lurch upon reaching a certain street and he was not in his place on the car, the acts of the conductor, consisting in his failure to be at his post, would constitute negligence, and in such a case the verdict should be for plaintiff, is erroneous, as the duty of the conductor with reference to his place on the car is a question of fact, and there was no issue on this subject.

- [3] ID.—CONTRIBUTORY NEGLIGENCE.—Such instruction is prejudicially erroneous, in that it fails to take into account the alleged contributory negligence of the plaintiff, this defense having been made.
- [4] ID.—INSTRUCTION—PROXIMATE CAUSE OF INJURY.—Such instruction is erroneous in overlooking the principle that the negligence must be a proximate cause of the injury in order to justify recovery.
- [5] ID.—EMPLOYEES OF CARRIERS—PLACE OF PERFORMANCE OF DUTIES. The law fixes no particular place for the performance of the duties of the employees of a carrier; it merely fixes the obligation of the carrier to the passenger.
- [6] ID.—LURCHING OF CAR.—Such instruction is erroneous in permitting the jury to find for the plaintiff, not only upon conduct of the conductor which could not be a proximate cause of the injury, but also if she was injured by a jerk or lurch of the car, necessarily incident to its operation over the intersection of a street at fast speed, and if the conductor was not in his place.
- [7] ID.—PROXIMATE CAUSE OF INJURY—MATTERS OF LAW.—When the court specifically instructs the jury that in a certain state of facts they must bring in a verdict for the plaintiff, the jury has a right to assume that the court in that instance is determining as a matter of law that such negligence was the proximate cause of the injury and that there was no contributory negligence.
- [8] ID.—INSTRUCTION TO FIND FOR PLAINTIFF—ESSENTIALS OF.—The rule is that where an instruction directs a verdict for plaintiff if the jury finds certain facts to be true, it must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion that the plaintiff is entitled to the verdict.
- [9] ID.—JUSTIFIABLE RATE OF SPEED — AMBIGUOUS INSTRUCTION.—In such a case an instruction that the defendant may be justified under certain circumstances in running its car at "a very fast"

or "the fastest rate" of speed, while under other circumstances to run its cars at "a high" rate of speed might be negligence, and that if the jury found that the defendant operated its car at such a rate of speed while approaching the streets where the accident happened, and that said speed contributed to or was the proximate cause of the accident, the verdict should be for the plaintiff, is ambiguous, because it does not appear what rate of speed was considered by the court in the last sentence of the instruction.

- [10] **ID.—ERRONEOUS INSTRUCTION.**—Such instruction is erroneous in that it allows the jury to bring in a verdict for plaintiff if the rate of speed "might be negligent." In order that the plaintiff should recover because of the speed alone, it is essential that the speed should have been negligent under the circumstances.
- [11] **ID.—PROXIMATE CAUSE—SPEED CONTRIBUTING TO.**—Such instruction is erroneous in the fact that the jury was instructed that if the speed contributed to or was the proximate cause of the accident, their verdict should be for the plaintiff.
- [12] **ID.—CONSTRUCTION OF INSTRUCTION — CONTRADICTORY INSTRUCTIONS.**—Instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant, and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned.
- [13] **ID.—EVIDENCE—CONDUCT AND HABIT OF CONDUCTOR.**—In such a case, evidence as to the previous conduct and habit of the conductor as to sitting down and talking to the passengers was improperly received, not only because the matter was not in issue, but also because his habit was not competent.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Howard A. Pears, Judge Presiding. Reversed.

The facts are stated in the opinion of the court.

Gibson, Dunn & Crutcher and Norman S. Sterry for Appellant.

E. E. Rogers for Respondent.

**WILBUR, J.**—The plaintiff recovered judgment for personal injuries received by her by reason of being thrown

from a car of the defendant Railway Company while she was a passenger thereon. The complaint alleges that the car was so negligently operated that it started with a sudden jerk while the plaintiff was standing on the platform of the car, thereby throwing her with great force and violence to the pavement. The defendant denied this act of negligence and by way of affirmative and separate defense alleged that the plaintiff contributed to her own injuries by negligently attempting to alight from the car while it was still in motion. It appeared from the evidence that the car was operated westerly on West First Street, in Los Angeles, and was descending a steep hill from Figueroa to Fremont Street about 9 P. M., November 17, 1917. The hill ends at the easterly line of Fremont Street. The intersection of First and Fremont Streets is level, and in order to stop on the level it is customary to cross Fremont Street before stopping. The plaintiff knew of this custom. The evidence as to where the plaintiff struck the pavement on leaving the car varied from fifteen to seventy-five feet east of the east line of Fremont Street. Thus, according to the witnesses which place the point of accident nearest to the usual stopping place of the car, it was the entire width of Fremont Street, plus fifteen feet from the point where the rear end of the car usually stopped.

The plaintiff testified that after the conductor gave the signal to stop the car he took a seat in the rear of the car with a lady passenger; that plaintiff walked to the rear platform of the car, and stood there holding an upright stanchion with one hand and the handhold of the rear seat with the other. While so standing on the rear platform the car came to a stop; that she did not attempt to alight, but that the car suddenly started forward with a jerk that threw her from the platform; that she alighted on the stone pavement on her head and was rendered unconscious. Jefferson Owens, a boy of ten years, was watching the car from the window of his residence, opposite the scene of the accident. He saw the plaintiff fall from the car, and noticed at the time that the conductor was seated at the time, talking to a lady passenger; that the car was slowing down on the hill from twenty miles per hour to ten; that at ten miles the car either suddenly accelerated or decreased its speed two miles per hour (he testified both

ways) with a jerk that threw plaintiff from the platform to the pavement. The conductor was in France with the A. E. F. and his testimony could not be secured. The only other witness who saw the accident testified that the plaintiff walked down the steps from the rear platform, and either stepped off the car backward or fell off from the lower step while the car was still in motion; that there was no jerk or lurch or unusual motion of the car. Ten witnesses called by the defendant testified that there was no jerk or lurch of the car, and that the car did not stop before reaching its usual stopping place.

[1] Before passing to a consideration of the main points of the case, one or two preliminary matters may be briefly disposed of. The respondent claims that the plaintiff alleges negligence and carelessness in the operation of the car and that the answer by failure to deny this allegation admitted the same. The plaintiff is in error in that regard. As already stated, the complaint specifically counts on the negligent starting of the car, after stopping, and this allegation is specifically denied. The respondent also claims that by reason of the fact that the defendant raised the issue of contributory negligence, its own negligence was thereby admitted. In the first count of the answer, negligence was specifically denied. The second count alleges the contributory negligence of the plaintiff and by failure to deny its own negligence in that count thereby, for the purpose of that count, admitted negligence. The defendant had a right to make inconsistent defenses and did so.

The evidence in the case was conflicting and would have justified the jury in the conclusion that the car never stopped until it had passed beyond the point where the plaintiff was thrown to the pavement; that the car stopped at the point where plaintiff was thrown to the pavement and suddenly started with a jerk, thereby causing her fall; that the plaintiff heedlessly attempted to alight while the car was moving with considerable speed and fell, either because she heedlessly walked off the car backward, or fell off while attempting to alight, or was thrown off by a sudden jerk or lurch of the car while she was on its steps, attempting to alight, or while standing on the platform, either holding on with both hands, as she testified, or while standing without holding on; that at the time of the accident the con-



ductor was forward in the car; or that at the time of the injury he was seated, engaged in conversation with a lady passenger.

The car was a "pay-as-you-enter" car and the usual station of the conductor in such a car is at the rear entrance, where passengers enter the car and from which some of them make their exit, others going to the forward exit. In this state of the evidence the court gave the following instruction: "You are further instructed that if you find from the facts in this case that the conductor was not attending to his duties, in this, that he had knowledge that this plaintiff was about to alight and that said place was a dangerous place in this, that the car was traveling at a fast rate of speed and would necessarily give a lurch or jerk upon reaching Fremont Street, then and in this case I charge you that the acts of the conductor, consisting in his failure to be at his post, constitutes negligence on the part of this defendant, and in that case if you so find, you are instructed to bring in a verdict for this plaintiff."

[2] Appellant contends that this instruction should not have been given, for the reason that there is no issue in the case as to negligence arising from the position of the conductor; that it instructs the jury upon a question of fact;

[3] and that it is prejudicially erroneous because it fails to take into account the alleged contributory negligence of the plaintiff, [4] and also the fact that the negligence of the conductor, if any, must be the proximate cause of the injury in order to justify recovery based upon such negligence. Each of the points is well taken. The instruction advances the proposition that if the conductor knew that the plaintiff was about to alight and that the alighting place was dangerous because the car was traveling at a fast rate of speed and would necessarily give a lurch upon reaching Fremont Street, and was not in his place, "then and in this case I charge you that the acts of the conductor, . . . constitutes negligence . . . and in that case if you so find, you are instructed to bring in a verdict for this plaintiff." The instruction thus assumes as a matter of law that it is the duty of the conductor under such circumstances to be at a certain place at the rear end of the car. This is purely a question of fact. The place of duty of the conductor depended upon the terms of his employment, while the

duty of the defendant to the plaintiff arose out of the relationship of passenger and carrier. [5] The law fixes no particular place for the performance of the duties of the employees of the carrier; it merely fixes the obligation of the carrier to the passenger. A conductor has various duties to perform. (*Cary v. Los Angeles Ry. Co.*, 157 Cal. 599, 604, [21 Ann. Cas. 1329, 27 L. R. A. (N. S.) 764, 108 Pac. 682].)

It is argued that in the "pay-as-you-enter" car it is the duty of the conductor to be at the rear end of the car and that decisions recognizing the fact that the conductor might be called to other parts of the car, such as *Cary v. Los Angeles Ry. Co.*, *supra*, are not applicable for that reason. This contention merely emphasizes the vice of the instruction, for it concedes that in the old-fashioned car, where the conductor went about the car collecting fares, his position might be at any point in the car where his duties called him, but that in the "pay-as-you-enter" car, he must remain upon the rear platform, and from this it is apparent that the place of duty of a conductor varies with different circumstances; in other words, it is a question of fact and not of law. The instruction is also erroneous because it entirely overlooks the principle that the negligence must be a proximate cause of the injury in order to justify recovery. This is manifest from the fact that the lurch or jerk referred to in the instruction is the necessary lurch or jerk of the car upon reaching Fremont Street. According to some of the witnesses, in this case the plaintiff was thrown to the ground seventy-five feet before reaching Fremont Street, and thus the fact that the conductor had reason to anticipate such a jerk at Fremont, if it be a fact, would have nothing whatever to do with the injuries to the plaintiff, if she in fact was thrown from the car before the point indicated was reached, for, in that view of the case, the jerk or lurch that caused the accident was not the one the conductor had reason to anticipate, and hence his conduct could not be the proximate cause of the accident. If we accept the testimony of the plaintiff herself, the instruction has no application to the facts, for the instruction is predicated upon a sudden jerk necessarily resulting from the descent of the hill at a fast speed, while her evidence involves a jerk upon starting from a standstill.

If we accept the testimony of her only other witness to the accident, the boy of ten years, the instruction has no applicability, because the jerk was caused by the increase or decrease of the speed at ten miles per hour, which the jury could have hardly considered "fast," as the car had been running twenty miles per hour, according to this witness. If we accept the testimony of the defendant's sole witness to the accident, there was no jerk or lurch of the car, and the plaintiff was on the lower step. On any of these theories as to the injury to the plaintiff, we fail to see how it could be said that the position of the conductor was a proximate cause of the injury. According to the plaintiff and her witness, the proximate cause of her fall was a sudden and unexpected jerk of the car, with which the position of the conductor had nothing whatever to do, and the instruction introduced an entirely false quantity. We are not considering, let it be observed, what the duty of the conductor or of the defendant was with relation to a usual and expected lurch or jerk of the car; we are merely illustrating the fact that his position could not be the proximate cause of the injury. If there was negligence in failing to warn the plaintiff of such a usual and anticipated shock as described in the instruction, it was not alleged, or counted upon by plaintiff, and such contention is wholly at variance with her complaint and testimony. The proximate cause of the injury would be the shock or jar in any such an event, and not the position of the conductor. [6] The instruction then is faulty not only because it permitted the jury to find a verdict upon conduct of the conductor which could not be a proximate cause of the injury, but also because it in effect required them to find a verdict for the plaintiff if she was injured by a jerk or lurch of the car, necessarily incident to its operation over the intersection of First Street at fast speed, and if the conductor was not in his place.

The respondent justifies the giving of the instruction for the reason that while such negligence is not specifically alleged, it is claimed that the complaint alleges negligence in general terms, and that evidence was given as to the whereabouts of the conductor. The complaint, as already stated, counts upon the negligence of the company in suddenly starting the car with a jerk while the plaintiff was

alighting. There is no general allegation of negligence, and evidence of the whereabouts of the conductor was introduced by the plaintiff over the defendant's objections. However that may be, the instruction was so erroneous and prejudicial that it should not have been given in any event. Respondent's contention that this instruction was cured because of other instructions on the subject of proximate cause and contributory negligence cannot be maintained. The jury were elsewhere instructed, at defendant's request, that unless the plaintiff proved the negligence of the Railroad Company, and that such negligence proximately contributed to the injuries sustained, there could be no recovery; that the defendant was not responsible for the negligence of its employees unless it contributed directly or proximately to the injuries of the plaintiff; that if the plaintiff voluntarily undertook to step from the car while it was in motion and before it reached its usual stopping place and fell as a direct and proximate result of so attempting to leave the car, that plaintiff could not recover.

[7] The difficulty is that when the court specifically instructed the jury that in a certain state of facts they must bring in a verdict for the plaintiff, the jury has the right to assume that the court in that instance is determining as a matter of law that such negligence was the proximate cause of the injury and that there was no contributory negligence. Furthermore, as already pointed out, the position of the conductor was not in any possible view of facts a proximate cause of plaintiff's injuries. [8] The rule is that where an instruction directs a verdict for plaintiff if the jury finds certain facts to be true, it must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion that the plaintiff is entitled to a verdict. (*Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 184, [118 Pac. 700], citing *Killelea v. California etc. Co.*, 140 Cal. 602, [74 Pac. 157].)

[9] Appellant assigns as error the giving of instruction No. 4, as follows: "The court instructs the jury that the defendant Los Angeles Railway Corporation may be justified under certain circumstances in running its cars at a very fast, or the fastest rate of speed, while under other circumstances to run its cars at a high rate of speed might be

negligence. If you find in this case that the defendant company operated its car at such a rate of speed while approaching West First and Fremont Streets, and that said speed contributed to or was the proximate cause of this accident, then I charge you that your verdict in this case shall be for the plaintiff." The instruction is ambiguous because it does not appear therefrom what rate of speed was considered by the court in the last sentence of the instruction. The jury were told in the first sentence of the instruction that the defendant might be justified in running its cars at a very fast or the fastest rate of speed and under other circumstances that a high rate of speed might be negligent. Three rates of speed are dealt with in this sentence—"very fast," the "fastest rate" and a "high" rate. The first two might be justified and the last negligent. The instruction is plainly susceptible of the construction that if the defendant's car was approaching Fremont Street at justifiable rate of speed and that such speed contributed to or was the proximate cause of the accident the verdict should be for the plaintiff, which would be clearly erroneous. Assuming, however, that the speed referred to in the last sentence is the high rate of speed which "might be negligence," the concluding clause of the sentence should be interpreted as follows: "If you find in this case that the defendant company operated its car at such a rate of speed (as might be negligent) while approaching West First Street and Fremont Street, and said speed contributed to or was the proximate cause of the accident, then I charge you that your verdict in this case shall be for the plaintiff."

[10] This instruction is still erroneous for several reasons. In the first place, it allows the jury to bring in a verdict for the plaintiff if the rate of speed "might be negligent." In order that the plaintiff should recover because of the speed alone, it is essential that the speed should have been negligent under the circumstances. Furthermore, the complaint does not count upon a high and excessive rate of speed as a basis of recovery. On the contrary, it counts on the shock due to a sudden starting of the car. [11] A more serious objection to the instruction, if possible, is the fact that the jury were instructed that if the speed contributed to *or* was the proximate cause of the accident, their verdict should be for the plaintiff. The court may have intended

to have used the words contributed to *and* proximately caused as synonymous. But, as pointed out by the appellant, a certain amount of lurching and jerking of a car may be attendant upon the speed at which it is usually operated and such lurching and jerking is to be anticipated by the passenger. Under this instruction, the defendant would be liable even though the lurching and jerking of the car was usual upon the customary motion of the car. The instruction also ignores the question of contributory negligence by the plaintiff justifying a verdict if defendant's conduct contributed to the accident. The jury is specifically instructed that if the high rate of speed of the defendant might have been negligence and contributed to her injuries, she was entitled to a verdict. The instruction was erroneous.

[12] It is true, as respondent points out, that the instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed and the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in evidence the verdict was reached.

Because of the foregoing erroneous instructions, it will be necessary to reverse the case, and in view of a new trial it is proper to pass upon some of the other questions presented by the record.

The appellant complains of the refusal to give certain instructions offered on its behalf, one to the effect that if the conductor was seated in the rear open section of the car it was not negligence on his part and could not be made a basis of a verdict against the defendant. Another, that if the conductor was not in his usual position, but was seated and talking to a lady, it could not be considered as negligence and could not be considered except in determin-

ing how the accident occurred. In view of the discussion of the subject herein, it is sufficient to say that the refusal of these instructions emphasizes the error in instruction No. 3.

Instruction "C," asked by the defendant, was a correct exposition of the doctrine of proximate cause as applied to the seating of the conductor and the accident; it also pointed out that the plaintiff must be free from contributory negligence in order to recover. Respondent points out no error in this instruction and we observe none. It is, however, unnecessary to say more than that this refusal emphasizes the error in giving instruction No. 3, in which these two elements of proximate cause and contributory negligence are omitted. The court did not specifically point out the necessary connection between the misconduct of the conductor and the accident, when requested to do so by the defendant, and it is not likely that the jury would have been more able or willing to do so, under a very general direction as to the necessary causal connection between the accident and the conduct of the conductor.

[13] Evidence as to the previous conduct and habit of the conductor as to sitting down and talking to passengers was improperly received, not only because of the fact that the matter was not in issue, but also because of the fact that his habit was not competent (*Langford v. San Diego Electric Ry. Co.*, 174 Cal. 729, 732, 733, [164 Pac. 398]; *Steinberger v. California Elec. etc. Co.*, 176 Cal. 386, [168 Pac. 570]) to establish the condition at the time of the accident. We need not here consider the effect of the exception to this general rule considered in *Wallis v. Southern Pacific R. R. Co.*, 184 Cal. 662, [15 A. L. R. 117, 195 Pac. 408], where circumstantial evidence only is relied upon, and there are no eye-witnesses.

On cross-examination, the boy, Jefferson Owens, having testified on direct examination that the conductor was seated talking with a woman passenger at the time of the accident, was asked concerning his statement in writing theretofore made to the defendant's representative. The question and answer in the statement are as follows: "Where was the conductor at the time of the accident?" Answer: "When the lady fell he ran to the door." After his attention was called thereto, he was asked: "Why didn't you say there that you



saw him sitting talking to her?" The objection offered and sustained was as follows: "That is objected to as asking this witness, a youth of tender years, for a conclusion that a grown person could not make." Cross-examination as to conflicting statements is one of the most important rights of the adverse party. If it was true that the boy could not explain or understand the question, he should have been permitted to say so in response to the question, and thus the jury could weigh and consider his degree of intelligence.

Judgment reversed.

Shurtleff, J., Lennon, J., and Sloane, J., concurred.

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[L. A. No. 7069. In Bank.—October 20, 1921.]

J. W. RABE, Appellant, v. MAE LLOYD et al., Respondents.

[1] APPEAL—NOTICE—FAILURE TO NAME COURT.—In view of the fact that the only court in which an appeal in any case can be heard is determined by constitutional provision, and in view of the further constitutional provision that no appeal taken to the supreme court or to a district court of appeal shall be dismissed for the reason only that the same was not taken to the proper court, an appeal will not be dismissed because the notice of appeal did not state to what court the appeal was taken.

MOTION to dismiss appeal. Denied.

The facts are stated in the opinion of the court.

Morganstern & Smith for Appellant.

Sherman Lacey for Respondents.

THE COURT.—Motion to dismiss appeal, the ground of motion being that the notice of appeal is fatally defective in that it does not state to what court the appeal is taken. The notice is most specific in all other respects, describing with the utmost particularity the judgment from which the appeal was attempted to be taken.

Under the provisions of our constitution the only court to which the appeal in this case would lie is this court.

Section 941b of the Code of Civil Procedure, relative to appeals taken by the alternative method, provides that the notice of appeal shall state, among other things, that the party does hereby appeal "to the supreme or district court of appeal, as the case may be," from the judgment or order, identifying the thing appealed from with reasonable certainty. [1] Technical compliance with the provisions of this section would include a statement of the court to which the appeal is taken, but we are of opinion that failure in *this regard* should not be held to invalidate the notice of appeal. As we have noted, any appeal in this case could properly be taken only to this court. In every case there is only one court to which an appeal may properly be taken, this court or one of the three district courts of appeal, the respective appellate jurisdiction of supreme court and district courts of appeal being specified in the constitution. It is further expressly provided in the constitution (sec. 4, art. VI) that "No appeal taken to the supreme court or to a district court of appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto." In view of the fact that the only court in which an appeal in any case can be heard is determined by constitutional provision, and in view of the further constitutional provision which we have just quoted, we are of the opinion that this notice which does state an appeal from a judgment described with absolute certainty should be held sufficient to sustain the appeal.

The motion to dismiss the appeal is denied.

Angellotti, C. J., Wilbur, J., Sloane, J., Lawlor, J., Lennon, J., and Shurtleff, J., concurred.

[S. F. No. 9753. In Bank.—November 4, 1921.]

**FEDERAL MUTUAL LIABILITY INSURANCE COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.**

[1] **WORKMEN'S COMPENSATION ACT—PLAYFUL OR MALICIOUS ACT OF FELLOW-EMPLOYEE—INJURY OUTSIDE OF EMPLOYMENT.**—An injury received by an employee while engaged in his work from being hit in the eye by one of several grapes either playfully or maliciously thrown by a fellow-employee at another employee was not an injury arising out of, or in the course of, his employment within the meaning of the Workmen's Compensation Act.

**PROCEEDING** in *Certiorari* to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

Cooley, Crowley & Lachmund for Petitioner.

A. E. Graupner and Warren H. Pillsbury for Respondents.

**THE COURT.**—This is a petition in *certiorari* to annul an award made by the Industrial Accident Commission in favor of Gus Farsais and against the petitioner, who was the insurance carrier for the San Joaquin Packing Company, the employer of said Farsais.

At the time of the injury Farsais was working for the Packing Company, engaged in sweeping the floor of a part of the premises where other employees were putting grapes into a machine as a part of their duty. While Farsais was at work an employee threw some grapes at another employee, and, his aim being bad, he missed the other person and one of the grapes hit Farsais in the eye, thereby causing his injury. Upon the evidence the commission made a finding that the injury occurred "in the course of and arising out of his employment, as follows: One employee threw some grapes at another employee and one of the grapes struck the de-

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1. Whether injuries caused by sportive acts are injuries arising out of, and in the course of, the employment, notes, 13 A. L. R. 540; L. R. A. 1918E, 504.

fendant Gus Farsais in the left eye, resulting in the permanent disability hereinafter described."

There was nothing in the nature of the employment in which any workmen present were engaged which required any of them to throw grapes at another. The act was either a playful or a malicious act of one employee toward another, having no connection whatever with the work in which he was engaged.

[1] The case is not distinguishable from *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, [L. R. A. 1916F, 1164, 158 Pac. 212], and *Fishing v. Pillsbury*, 172 Cal. 691, [158 Pac. 215]. It comes within the general rule of the cases known as the "skylarking" cases or "horse-play" cases. The court did not issue this writ with any desire to overrule those cases. At the time the alternative writ was issued the court had ordered a writ issued in a case previously filed, entitled *General Accident F. & L. A. Co. v. Industrial Acc. Com.*, 186 Cal. 653, [200 Pac. 419], in which an opinion was rendered on August 15, 1921, and it was desired to consider that case fully prior to a decision upon the present case. The line of demarcation between cases which come within the definition of an injury "arising out of, and in the course of, the employment" and those which do not, is of necessity a narrow one, and it is not always easy to distinguish the exact point of division without careful consideration. In the case last referred to the employer became engaged in a controversy, amounting to a quarrel, arising immediately out of his business, and while so engaged and before the matter was concluded, and because of such controversy, he fired a shot at one of the men engaged therein, missing him, but which glanced and hit one of his own employees, thus causing the injury complained of. It is evident that the act which caused the injury was one which arose directly out of the business in which the injured person was employed. As the court said in the opinion in that case, the injury "was received in the course of a series of incidents which had their initiative in a business transaction of his employer and while the latter was actively and justifiably engaged in defending his business." This was held to be an injury arising out of his employment. In the present case the throwing of grapes had no connection whatever with the general business carried on in the establish-

ment, nor with the particular work of any employee therein. The respondent concedes that the decision of the commission is inconsistent with the decisions of this court first above cited. It is contended in its behalf that those cases should be overruled. The argument is that in every establishment where a number of workmen are required to be near to each other in the course of their employment for hours at a time "some frolicking is inevitable. It occurs in every plant. The industry, by bringing workmen together in numbers, exposes its workmen to this hazard, which is just as much a hazard incident to the employment and 'arising out of the employment' as the danger of slipping upon floors, colliding with other workmen, falling down stairs," and the like.

Although this line of reasoning has support in the decisions of some of the other states, it is contrary to our own, and it seems to us to be an unwarranted extension of the meaning of the controlling language of the constitution and of the statute defining the character of injuries that are to be compensated out of the earnings of the business in which they occur. In the Coronado Beach Company case we said: "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work, or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment." And after a full review of many authorities on the subject it was held that the injury to the claimant caused by the act of a fellow-servant in "tickling" him while he was at work did not "arise out of" his employment. Such injuries have no connection whatever with the work the employee is doing at the time, or with the work the mischievous employee was engaged to do, or with any business carried on in the place of employment, or with any peculiar construction or characteristics of the place of employment for which the employer could be held responsible and which creates "a risk reasonably incident to the employment." All this is true of the case at bar. It is, therefore, to be decided in accordance with the same rule.

The award is annulled.

Shaw, J., Shurtleff, J., Wilbur, J., Sloane, J., and Lawlor, J., concurred.

[Sac. No. 3199. In Bank.—November 4, 1921.]

THEODORE W. CHESTER, etc., Appellant, v. D. W. CARMICHAEL et al., Respondents.

[1] MUNICIPAL CORPORATIONS—CONVEYANCE OF LAND FOR PARK—CONDITIONS SUBSEQUENT—CONSTITUTIONAL LAW.—The acceptance by a city of a deed to a tract of land upon the condition that the land should revert to the grantors unless the city should expend not less than five thousand dollars annually in improving it as a park, the total cost of the improvement aggregating fifty thousand dollars, created a liability to the grantors within the meaning of section 18 of article XI of the constitution, which precludes any city from incurring any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof.

APPEAL from a judgment of the Superior Court of Sacramento County. Charles O. Busick, Judge. Reversed.

The facts are stated in the opinion of the court.

Theodore W. Chester, *in pro. per.*, and Meredith, Landis & Chester for Appellant.

R. L. Shinn and White, Miller, Needham & Harber for Respondents.

ANGELLOTTI, C. J.—Plaintiff, a taxpayer of the city of Sacramento, instituted this action on behalf of himself and all other taxpayers, seeking thereby an injunction prohibiting the city of Sacramento and various officers thereof from carrying out the provisions of a certain deed conveying real property to the city for park purposes, and to have such deed declared void, the theory of the action being that such action on the part of the city would be in violation of the provision of our constitution, which declares that “No county, city, town, . . . , shall incur any indebtedness or liability in any manner or for any purpose exceeding in

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1. Creation of indebtedness within the meaning of debt limit provisions, notes, 44 Am. St. Rep. 229; 3 L. R. A. (N. S.) 684; 37 L. R. A. (N. S.) 1058; L. R. A. 1917E, 437.

any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity." (Const., sec. 18, art. XI.) Demurrers to the complaint were sustained, and judgment thereupon given for defendants. This is an appeal by plaintiff from the judgment.

The material facts shown by the complaint are as follows: On or about December 1, 1919, defendants George H. Cutter and Carrie M. Cutter, his wife, and defendant Hickman Investment Company, a corporation, executed and delivered to the city of Sacramento, which accepted the same, a conveyance of an oblong tract of land in Sacramento some 360 feet in width by from 2,696 to 2,772 feet in length, one-half of which was owned by the Cutters and one-half by the Hickman Investment Company. The conveyance was to the city, its successors and assigns forever, for park and recreation purposes. It was declared therein that it was executed "for and in consideration of the covenants and conditions" expressed therein. The conveyance was declared by its terms to be "subject to the following express conditions subsequent," nine such conditions being stated. These were that the premises shall be used and maintained by the city permanently as a public park or as a public park and playground, known and designated as "Wm. Curtis Park"; that the land shall be divided into three subdivisions as shown on a map attached, each subdivision to have a driveway extending through the same, open for public traffic, as indicated upon said map; that the city shall lay out and maintain a driveway at least twenty-five feet wide on the eastern outer edge of the property, from the northerly to the southerly portions thereof, and a like driveway on the western outer edge, the same to be public and open to the streets which may be constructed upon the adjoining property and extending to said property; each of the three subdivisions shall have next to the two outer or main driveways a border of forty feet in width to be improved by the city or its representatives "to lawns and shrubbery and to be



used as a park," the remainder or interior of each subdivision "to be used as a park or for playground purposes, but playgrounds proper are not to extend on the forty (40) foot borders"; the permanent improvement within five years of said driveways, and the express provision that "the owners of property bordering or abutting on said park are not to pay for any such driveways, or for the curbs or gutters on either side of such driveways," and that "in the event that any assessments should be levied against" such owners for any of such purposes, the same shall be paid by the city; that "there shall be expended by" the city "a minimum sum of five thousand dollars (\$5,000) per year for the improvement of the parks and playground in said park"; that "the first five thousand dollars (\$5,000) is to be expended during the year beginning January 1, 1920; and a like sum is to be expended each year thereafter until the entire property has been improved as a park"; and that the taxes which became a lien on the first Monday of March, 1919, shall be paid by the city. It was then provided that should the city "fail to conform to or comply with any of the above conditions," the grantors, their successors or assigns, "may, at any time thereafter, give written notice" to the city of such failure, and if the same are not complied with within six months thereafter, "then said property shall revert to and become again the property of" the grantors, their successors or assigns. The cost of the work of construction and improvement required will exceed the sum of fifty thousand dollars, and the cost of maintenance will exceed five thousand dollars per annum. Defendants have commenced the work of improvement, having already expended therein over one thousand dollars from the income and revenue of the city for the fiscal year 1920, and unless restrained by the courts will carry out all the terms and provisions of the deed. All the funds of the city for the year 1919 were exhausted before December 31, 1919. All of the moneys incident to the proposed work will be paid out of revenue and income received during the year 1920 and each subsequent year. There has been no assent on the part of the qualified electors of the city, or any part thereof, to the carrying out of the proposed plan or any part thereof.

From the foregoing it is apparent that in so far as the grantors are concerned the city, in consideration of the con-

veyance, has agreed, among other things, to expend a minimum sum of five thousand dollars annually in the work of improving the park site in a designated way and in constructing two driveways for public traffic through the same, and also driveways at least twenty-five feet wide along the whole length on each side, "the same to be public and open to the streets which may be constructed upon the adjoining property," free of cost of any kind to any owner of property bordering or abutting on the park. This work in the aggregate will cost, it is alleged, fifty thousand dollars. Whether or not the performance of this obligation will benefit the city is an immaterial matter in this controversy. The obligation created by the contract is one in favor and for the benefit of the grantors, who have fully executed their part by the conveyance and delivery of the property, their successors and assigns. As a matter of fact, the provisions of the conveyance indicate that the doing of the proposed work in the manner provided was deemed by the grantors to be of special value to the property adjoining on both sides, and the undertaking by the city to do such work was the real consideration for the transfer. This is especially true as to the driveways and the forty-foot strip of garden on each side especially reserved from playground or recreational uses. Performance of the obligation would be, in substance and effect, payment to the grantors, in the way stipulated in the deed, for the property conveyed by them. By means of conditions subsequent expressed in the deed, the property conveyed was practically pledged to the grantors as security for the performance of the undertaking, the title to revert to them, their successors or assigns, in the event of nonperformance, if they so elect. It may be assumed that the city cannot be held liable in damages for failure to carry out this contract, or specifically compelled to perform, and that the only penalty for failure to perform is the reversion of the property to the grantors, their successors or assigns. This being the situation, the question is whether the transaction, the giving and acceptance by the city of the deed, involved the incurring by the city of "any indebtedness or liability in any manner or for any purpose" *with relation to the grantors, their successors or assigns*, within the meaning of section 18 of article XI of our constitution. If it did, admittedly, in the light of the facts alleged in the complaint,

the liability exceeded the income and revenue provided for the year 1919, the year in which the transaction was had.

Assuming the validity of the transaction between the parties apart from any question as to the effect of the constitutional provision, it seems clear that an obligation was imposed thereby upon the city, in favor of the grantors, their successors and assigns, to expend in the specified work at least five thousand dollars per annum for a period of years and until the completion thereof. To this extent the income and revenue of future years was attempted to be appropriated for the performance of this obligation in favor of the grantors, an obligation assumed by the city in consideration of the transfer to it of the property. Assuming the complete carrying out of its part of the agreement by the city, there will have been such an appropriation. The doing of this work, with a prescribed minimum expenditure therefor each year, was, as we have said, the purchase price for the land, payable in yearly installments, the grantors having fully performed their part by conveyance and delivery of the land. Notwithstanding the absence of any liability for damages for failure to perform, and the fact that the obligation could not be specifically enforced, there was an obligation in favor of and for the benefit of the grantors, involving the expenditure in a certain way, and for specified purposes, of future revenues of the city, accompanied by what was in substance a pledge of the property conveyed as security for its performance. That the matter was cast in the form of conditions subsequent is unimportant. In substance and effect the transaction was as we have stated it.

[1] So regarding the transaction, we are of opinion that it falls within the inhibition of section 18 of article XI of the constitution, which precludes any city from incurring "any indebtedness or liability in any manner or for any purpose" exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof. That there was a liability in favor of the grantors imposed on the city upon the acceptance by it of the conveyance seems clear. The ability of the creditor to enforce a claim by a judgment for money is not essential to a "liability" as that term is used in such constitutional provisions as ours. As the consideration of

the executed conveyance to the city there was an obligation in favor of the grantors to expend five thousand dollars yearly in the completion of the specified work, which, according to the complaint, would cost fifty thousand dollars, and the property that had been conveyed to the city was pledged for full performance of the obligation. The city must either expend all the money necessary to complete the work from its future revenues, or lose the property with all it may have paid to the time of loss in improving the same. Numerous cases cited holding that where a city acquires property subject to a mortgage or trust deed with a stipulation that the city is not to be held liable in any way for the payment of the debt thereby secured other than by the enforcement of the lien on the property, such debt constitutes a part of the indebtedness of the city within the meaning of that word as contained in constitutional provisions confining the indebtedness of the city within a prescribed limit, illustrate how such an indebtedness may be incurred without any means of enforcement other than loss of the property. In *Browne v. City of Boston*, 179 Mass. 321, [60 N. E. 934], the court said of such a transaction: "But the property, when conveyed, will be subject to the mortgages that have been placed upon it pursuant to the arrangement that has been made, and the city either will have to pay them, or submit to have the property taken from it by foreclosure proceedings. It will thus become indirectly liable for the amount secured by the mortgages, and the taxpayers will ultimately be obliged to pay it as contemplated. . . . The object of the statute is to protect the taxpayer by confining the indebtedness of a city within a prescribed limit. The manner in which the indebtedness is created is immaterial, if the result is to subject the city to a present liability, direct or indirect, which the taxpayers eventually will be called on to meet. It seems to us that such will be the result of the ingenious scheme that has been devised in the present case. We think the statute cannot be evaded in the manner proposed." (See, also, *Voss v. Waterloo Water Co.*, 163 Ind. 69, [106 Am. St. Rep. 201, 2 Ann. Cas. 978, 66 L. R. A. 95, 71 N. E. 208]; *Eddy Valve Co. v. Town of Crown Point*, 166 Ind. 613, [3 L. R. A. (N. S.) 684, 76 N. E. 536]; *Fidelity Trust & Guaranty Co. v. Fowler Water Co.*, 113 Fed. 560, 568; *Lesser v. Warren Borough*, 237 Pa. 501, [43 L. R. A.

(N. S.) 839, 85 Atl. 839].) We have here the obligation to expend certain specified sums annually, secured by the provision for reversion of the property in the event of non-performance. The words "any . . . liability in any manner or for any purpose" in our constitutional provision are words of broad import, and we think that, fairly construed, they include such an obligation as the one here involved.

The facts of this case present what at first blush appears a rather novel application of the constitutional provision, but when the real transaction between the parties is fully understood, the matter appears simple enough. We are not concerned here with the indebtedness to be created in favor of contractors, materialmen, and workmen when the city each year contracts for the doing of certain work, or buys material and employs labor for the doing of the same. We have here simply the liability *to the grantors*, created by the acceptance of the conveyance. As to them, the transaction was simply one of sale and purchase, completely executed by the grantors, the consideration being the future improvement by the city of the conveyed premises in a specified way for the benefit of the grantors, their successors and assigns, at an expenditure of at least five thousand dollars per year. Learned counsel for respondents admit that "where a purchase is made upon the installment plan, even though the only remedy for the enforcement by the seller of the payments is the right to declare a forfeiture, yet a debt has been created at the time the contract is entered into for all the sums subsequently to be paid." Such, as we have said, was in substance this transaction. That the money was to be paid by the city to those actually doing the work deemed by the grantors to be of sufficient benefit to them to warrant them in making it the consideration for their conveyance, instead of to the grantors themselves, is immaterial. It was the construction of the improvement at the specified cost per year, presumably to the benefit of their property, that constituted the consideration for their conveyance. Likewise it is altogether immaterial, in so far as the liability to the grantors is concerned, that the city will own the improved park.

In the view we take of the nature of this transaction, it is obvious that such cases as *McBean v. Fresno*, 112 Cal. 160, [53 Am. St. Rep. 191, 31 L. R. A. 794, 44 Pac. 358], *Smilie v. Fresno*, 112 Cal. 311, [44 Pac. 556], and *Doland*

v. *Clark*, 143 Cal. 176, [76 Pac. 958], are in no way in point. Here the full liability to the grantors was created *upon the acceptance of the deed*, the entire consideration therefor having been furnished. The cases cited involved contracts for the furnishing to a city in the future of service, materials, etc., and it is held that no indebtedness or liability within the meaning of the constitutional provision is incurred until the furnishing of the service, materials, etc., the consideration for the payment to be made. The distinction is clear, and is recognized by many decisions. It is concisely stated in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 20, [43 L. Ed. 341, 19 Sup. Ct. Rep. 77, see, also, Rose's U. S. Notes], as follows: "In the one case the indebtedness is not created until the consideration has been furnished; in the other (where the consideration on the other side is fully furnished at the time of the transaction) the debt is created at once, the time of payment being only postponed."

In support of the claim that the construction of the constitutional provision invoked by appellant is unreasonable in the light of its results, learned counsel for respondents say that to sustain it would mean that a city could not expend money on land granted on condition simply that it be maintained as a park or highway, etc.; in other words, that a city could not expend money on land conveyed solely for park or highway purposes. To our minds this result would not follow. That a city may accept land to be used by it for a specified purpose, and thereafter expend such money thereon as it, in the exercise of its discretion, deems proper in the use to which it is devoted, cannot be doubted. But that would be a very different case from this, wherein the doing of certain prescribed future work in a specified way and at a specified cost to the city per annum is made the consideration for the conveyance.

We are of opinion that the complaint stated a cause of action.

The judgment is reversed.

Shurtleff, J., Wilbur, J., Sloane, J., Lawlor, J., Lennon, J., and Shaw, J. concurred.

Rehearing denied.

All the Justices concurred.

[S. F. No. 9758. In Bank.—November 5, 1921.]

GREAT WESTERN POWER COMPANY OF CALIFORNIA (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

[1] WORKMEN'S COMPENSATION ACT—FRIENDLY WRESTLING MATCH—INJURY OUTSIDE OF EMPLOYMENT.—An injury received by an employee while in the performance of his duties from being accidentally fallen upon by two fellow-employees who were engaged in a wrestling match, which was not caused by any dispute over the work or over anything connected with the employment, was not an injury arising out of, or in the course of, his employment within the meaning of the Workmen's Compensation Act.

PROCEEDING in *Certiorari* to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

Guy C. Earl and W. H. Spaulding for Petitioner.

A. E. Graupner and Warren H. Pillsbury, for Respondent.

LAWLOR, J.—This is a proceeding in *certiorari* on a petition by the Great Western Power Company of California, a corporation, to review the action of the respondent Industrial Accident Commission allowing an award against petitioner in favor of respondent E. L. Holbrook for injuries received by him while employed by petitioner.

Respondent Holbrook was employed by petitioner in the capacity of pumpman at Belden, California. While in the performance of his duties he was walking from the tool-house to a shaft or tunnel in which he was working. On his way to the shaft he passed over a board platform on which two fellow-workmen were engaged in a friendly wrestling match. The scuffling was not caused by any dispute or altercation over the work or over anything connected with the

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1. Right to compensation in case of injury sustained through horse-play or fooling, under workmen's compensation statutes, notes, 13 A. L. R. 540; L. R. A. 1918E, 504.



employment, and respondent was not participating in it. The wrestlers accidentally fell on him and broke his left leg. He was incapacitated for two months, and applied to the Industrial Accident Commission for compensation under the Workmen's Compensation, Insurance and Safety Act. A hearing was had by that body and it was found the respondent sustained injury occurring in the course of, and arising out of, his employment, and that he was entitled to a benefit of \$160.69. Petitioner applied for a rehearing before the Industrial Accident Commission, which was denied. This petition followed.

Petitioner contends that "said commission in rendering said decision and entering said award acted without and in excess of its powers and that the order and decision are unreasonable and that the findings of fact of the said commission in said proceeding do not support the order, decision or award here sought to be reviewed." It insists that "In the case at bar, there are absolutely no facts or circumstances to take this case out of the general rule uniformly followed both in England and in the United States that injuries resulting from 'horse-play' among employees whether the injured party is a participant or not do not 'arise out of the employment.' " In support of this position are cited *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, [L. R. A. 1917F, 1164, 158 Pac. 212]; *Fishing v. Pillsbury*, 172 Cal. 690, [158 Pac. 215].

Respondents assert: "We frankly concede that the decision of the commission is inconsistent with the ruling of this court in *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, [L. R. A. 1917F, 1164, 158 Pac. 212], and *Fishing v. Pillsbury*, 172 Cal. 690, [158 Pac. 215], both cases being decided the same day. In view of the fact that these cases were early decisions upon the question of horse-play rendered in 1916, and before the doctrine was well established in other states, and that since that time the leading states upon the doctrine have taken the opposite view, so we take the liberty of urging upon the court a reconsideration of the views therein expressed"; that "where an employee is attending properly to his own work without diversion for purposes of horse-play, and is injured by the frolicking act of another employee, such injury, except in exceptional cases, may be said to arise out of the employment, for the reason that the

danger of ordinary frolicking by employees is a danger incident to every business which brings employees together in numbers''; and that ''hazards due to the usual propensities of workmen being brought together in numbers for the purpose of employment should be the hazards insured against both to protect the individual and the community.''

In support of this position respondents cite authorities from other jurisdictions decided since the above-mentioned cases. Petitioner, however, asserts that ''These last-mentioned cases have been cited with approval in a very large number of decisions from the highest courts of many of the states of the land. In the decisions referred to by respondents hercin, which do not follow the foregoing cases, the court has had great labor to create and point out circumstances differentiating the cases from these two leading cases.''

The Workmen's Compensation, Insurance and Safety Act of 1917, section 6 (a), [Stats. 1917, pp. 831, 834] provides: ''Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against an employer for an injury sustained by his employees arising out of and in the course of the employment . . . ''

*Coronado Beach Co. v. Pillsbury, supra*, is a case where an employee, who was particularly susceptible to tickling, while in the course of his employment was going downstairs, when he was tickled in the ribs by another employee. As a result he fell down the stairs, sustaining injury. The court held he was not entitled to compensation, saying: ''The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment. . . . In the matter at bar the employment of Flint exposed him to no greater danger from being tickled by a fellow-servant than would a guest in the hotel of his employer have been so exposed.''. In *Fishering v. Pillsbury, supra*, an employee, about seventeen years of age, pointed a trick camera at another employee and caused a spring to be ejected from it. The spring struck the other in the eye, injuring him. The court held he was not entitled to

compensation, on the authority of *Coronado Beach Co. v. Pillsbury*, *supra*.

Respondents rely chiefly upon two cases which follow the rule they ask us to adopt. One of these is *Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, [13 A. L. R. 522, 128 N. E. 711]. In that case an employee, while engaged in the performance of his duties, was struck in the eye by an apple thrown by a fellow-servant at another. The court, in upholding the award, said: "Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service." Another authority is *Willis v. State Industrial Com.*, 78 Okl. 216, [190 Pac. 92], in which case an employee was, with several others, warming himself by an open fire during an interval in his work, and was injured because of the explosion of a piece of dynamite which a fellow-employee threw into the fire to see if it would explode. It was declared: "We think the correct rule is, and so hold in these cases, that if a workman is an active participant in what has been denominated 'horse-play,' he is not entitled to compensation, but if, while going about his duties, he is a victim of another's prank, to which he is not in the least a party, he should not be denied compensation." An authority similar to these is *Verschleiser v. Stern*, 229 N. Y. 192, [128 N. E. 126].

The other cases cited by respondents do not fully support the rule contended for by them. While in some of them compensation was awarded for injuries resulting from skylarking, in the cases where such compensation has been awarded special circumstances have appeared which made the skylarking peculiarly one of the risks of the employment. In other cases, the compensation was awarded for injuries received by employees as the result of altercations or quarrels, but in each of those cases the controversy had its origin in some misunderstanding or incident connected with the work. These cases decide that while ordinarily compensation will not be allowed where injuries are caused by skylarking or are the result of a dispute between employees, yet an injury may be so caused and still be held to arise out of the employment. Thus, in the case of *In re Loper*, 64 Ind. App. 571, [116 N. E. 324] an employee, while going about his duties, was injured by another's

sportive use of an air-compressor. The injured employee was not participating in the horse-play. The evidence showed the compressor was habitually used in this way. The court declared: "We are not dealing here with a sporadic, occasional, or unanticipated use of the air hose in play. . . . The employer, with knowledge of the facts, permitted such practice to continue. It was within his power to have prohibited it. By failing to do so, it became an element of the conditions under which the employee was required to work." A similar case was *State v. District Court*, 140 Minn. 75, [L. R. A. 1918E, 502, 167 N. W. 283]. There an employee was struck in the eye by a sash-pin thrown by a fellow-employee at another, not the injured workman. The injured employee was not engaging in the horse-play. It was customary for the employees to throw things at each other and it was found that the employer knew or should have known of the custom. The court said: "The rule is well enough settled that where workmen step aside from their employment and engage in horse-play or practical joking, or so engage while continuing their work, and accidental injury results, and in general where one in sport or mischief does some act, resulting in injury to a fellow-worker, the injury is not one arising out of the employment within the meaning of compensation acts. (Citing cases.) Here we conceive the situation to be different. Filas was exposed by his employment to the risk of injury from the throwing of sash-pins in sport and mischief. He did not himself engage in the sport. His employer did not stop it. The risk continued. The accident was the natural result of the missile throwing propensities of some of Filas' fellow-workers and was a risk of the work as it was conducted."

In *Mueller v. Klingman* (Ind. App.), 125 N. E. 464, also cited by respondent, the deceased employee and a fellow-employee were working together. The fellow-worker became angered at a remark made by deceased concerning the doing of the work, and threw a hammer at him, striking him in the head. The injury inflicted caused his death. The court held that the injury arose out of the employment, basing the decision on *Pekin Cooperage Co. v. Industrial Commission*, 285 Ill. 31, [120 N. E. 530], and quoting from that case as follows: "Where men are working together at the same work, disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, inter-

ference with one another, and many other details which may be trifling or important. Infirmary of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment."

Of the other cases cited by respondent, *Stuart v. Kansas City*, 102 Kan. 307, 563, [171 Pac. 913], *Marchiatello v. Lynch Realty Co.*, 94 Conn. 260, [108 Atl. 799], *Colucci v. Edison Portland Cement Co.*, 93 N. J. L. 332, [108 Atl. 313], are similar to *In re Loper*, *supra*, and *State v. District Court*, *supra*. The others resemble *Mueller v. Klingman*, *supra*, and were decided on the theory that injury resulted from an altercation concerning the work. These cases are *Heitz v. Rupert*, 218 N. Y. 148, [L. R. A. 1917A, 344, 112 N. E. 750]; *American Steel Foundries v. Melnik* (Ind. App.), 126 N. E. 33; *Polar Ice & Fuel Co. v. Mulray*, 67 Ind. App. 270, [119 N. E. 149]; *Pekin Cooperage Co. v. Industrial Commission*, *supra*. Another case, *Stasmos v. State Industrial Commission*, 80 Okl. 221, [195 Pac. 762], although decided on the authority of *Leonbruno v. Champlain Silk Mills*, *supra*, was clearly a case where the injury was caused by an altercation concerning the employment, inasmuch as the employee was injured as the result of an altercation with his foreman over which of two lifts he should use in leaving the place in which he was working, the mine having been shut down suddenly and the employees ordered to the surface. The English cases of *Thom v. Sinclair*, [1917] App. Cas. 127, and *Dennis v. White & Co.*, [1917] App. Cas. 479, contain valuable discussion of the phrase "arising out of the employment," but the facts are dissimilar and they do not assist in a decision of the case at bar.

[1] While the authorities cited above from New York and Oklahoma lay down the rule contended for by respondents, we are not prepared to concede that they represent the general trend of authority on the subject. We do not think, therefore, that these authorities would justify us in overruling the settled law of this state as laid down in *Coronado Beach Co. v. Pillsbury*, *supra*, and *Fishing v. Pillsbury*, *supra*, approved in the late case of *Federal Mut. Liability Ins. Co. v. Industrial Acc. Com.*, *ante*, p. 284, [201 Pac. 920], on the subject of injuries received by an

employee through horse-play. It cannot be held that all injuries so received in the course of the employment arise out of the employment. It may be remarked that the recent case of *General Accident etc. Assur. Corp. v. Industrial Acc. Com.*, 186 Cal. 653, [200 Pac. 419], is in harmony with the rule expressed in *Mueller v. Klingman*, *supra*, and the similar cases. In that case the injured employee was repairing a tire in a garage a short distance from where his employer and a stranger became engaged in a quarrel over the purchase of gasoline by the latter. The employer shot at the stranger and the bullet glanced and struck the injured employee, who had not participated in the quarrel. The question presented in that case was whether the injury arose out of the employment. Mr. Justice Shurtleff, in writing the opinion of the court, said: "In the present case the injury is largely, if not wholly, traceable to the acts of the employer. The controversy in which it was received arose out of an incident which concerned his business, namely, an application to purchase gasoline. That it ultimately resulted in a personal difference, or that the accident was an unusual one, not likely to occur, does not deprive it of its business character or establish that it did not arise out of the employment. . . . What are termed the 'horse-play' cases, and the rule in them announced, have no application here. The injury sustained by Shrout was not due to skylarking or a frolic, but was received in the course of a series of incidents which had their initiative in a business transaction of his employer and while the latter was actively and justifiably engaged in defending his business."

In the case at bar it is not claimed or shown that the scuffling was habitual, that the employer had any knowledge of the horse-play, or that it had any other characteristic which would make it a risk of the employment. The injury was an unfortunate accident which had no connection with the employment, and did not arise out of it. The employer should not be held liable.

The award is annulled.

Wilbur, J., Sloane, J., Shurtleff, J., and Shaw, J., concurred.

[L. A. Nos. 6563, 6564, 6565. In Bank.—November 7, 1921.]

O. B. BALTHASAR et al., Respondents, v. PACIFIC ELECTRIC RAILWAY COMPANY (a Corporation), Appellant.

[1] **MOTOR VEHICLE ACT—SPEED LIMITS—TURNING OF CORNERS—RULES INAPPLICABLE TO FIRE APPARATUS.**—The general restrictions as to speed and turning of corners applicable to vehicular traffic contained in the Motor Vehicle Act (Stats. 1917, p. 382), do not apply to a fire apparatus responding to an alarm, in view of the fundamental rule of construction that a statute is not applicable to the government or its agencies unless expressly included by name.

[2] **ID.—RIGHT OF WAY OF FIRE APPARATUS—CONSTRUCTION OF ACT.**—The provision of section 20 (m) of the Motor Vehicle Act that fire apparatus while being operated as such shall have right of way with due regard to the safety of the public has reference to the person required to yield such right of way, and notice to him is essential and a reasonable opportunity to stop or otherwise yield the right of way, necessary in order to charge him with the obligation to give precedence to the fire apparatus.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Frank Karr and R. C. Gortner for Appellant.

James H. Howard, Rhodes & Howard and F. C. Dunham for Respondents.

**WILBUR, J.**—On the eighth day of February, 1919, a collision occurred between a motor-truck belonging to the fire department of the city of Pasadena responding to a fire-alarm from North Fair Oaks Avenue and an electric railway train operated by the defendant corporation.

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2. Care required of driver of street-car or other vehicle to avoid collision with fire apparatus, notes, *Ann. Cas.* 1918A, 290; 19 *L. R. A. (N. S.)* 623; *L. R. A.* 1917E, 415; of fire apparatus to avoid collision with street-car or other vehicle in street, note, *Ann. Cas.* 1913E, 231.



The motor-truck was moving east on Bellefontaine Street, which terminated in Fair Oaks Avenue, and turned north on Fair Oaks Avenue without passing to the south of the intersection of the medial lines of Bellefontaine and Fair Oaks Avenue, colliding with a south-bound train of the defendant before the turn was completed. Charles Carlson and O. B. Balthasar were riding on the rear running-board of the motor-truck. The former was killed and the latter injured as a result of the collision. The city of Pasadena having paid an award made by the Industrial Accident Commission for the injuries of Balthasar and the death of Carlson, brought suits on behalf of Balthasar and the widow of Carlson to recover the damages sustained by them, respectively, and on its own behalf to recover damages sustained by reason of the injury to the motor-truck. These three cases were consolidated for trial, and verdicts were rendered in favor of the plaintiffs in each case. The defendant Railway Company appeals from the judgment upon said verdicts. It is conceded by the appellant that the evidence is sufficient to sustain the jury's verdict holding the defendant company negligent in the operation of its cars at an excessive speed, but contends that the plaintiffs were guilty of contributory negligence and that the court erroneously instructed the jury on that subject. These contentions require consideration of the meaning and effect of the ordinance of the city of Pasadena relating to the right of way for fire apparatus responding to a fire-call and to the provisions of the state Motor Vehicle Act upon that subject. Appellant claims that the driver of the motor vehicle violated the law in two respects, first, in cutting a corner in violation of section 20 (g) of the Motor Vehicle Act (Stats. 1917, p. 382), and, second, in driving at a speed in excess of fifteen miles per hour in approaching Fair Oaks Avenue, and in approaching the railroad tracks of the defendant company, in violation, it is claimed, of section 22 (a) of the Motor Vehicle Act of 1917 (Stats. 1917, pp. 382, 404, *supra*). The provisions of the statute relied upon by the appellant are as follows:

"Section 20 (g): All vehicles approaching an intersection of a public highway, with the intention of turning thereat, . . . in turning to the left shall run beyond the center of such intersection, passing to the right thereof, before turning such vehicle toward the left. For the purposes of this

subdivision the 'center of such intersection' shall be held to mean the meeting point of the medial lines of the two highways traversed by the vehicle making the turn."

"Section 20 (m): Police patrol wagons, police ambulances, fire patrols, fire engines and fire apparatus in all cases while being operated as such, shall have right of way with due regard to the safety of the public; but this provision shall not protect the driver or operator of any such vehicle or his employer or principal from the consequence of the arbitrary exercise of this right or for injuries willfully inflicted."

"Section 22 (a): . . . provided, further, that no person shall operate or drive a motor vehicle or other vehicle on any public highway at a greater rate of speed than fifteen miles an hour in approaching any steam, electric or other railway crossing at grade, or in approaching or traversing an intersecting highway, or crossing or intersection of highways, or in approaching or going around corners or curves in the highway, when in any of the foregoing cases the operator's or chauffeur's view of the road or railway traffic is obstructed, but anything to the contrary herein notwithstanding, no person shall operate or drive a motor vehicle or other vehicle on any public highway at a greater rate of speed than fifteen miles an hour in traversing any steam, electric or other railway crossing at grade; . . . "

The provisions of the ordinance (No. 1346) of the city of Pasadena involved in a consideration of the questions herein are as follows:

"Section 32. The officers and firemen of the fire department and their apparatus of all kinds, when going to or on duty at, or returning from a fire, and all ambulances, whether of public or private character, and all other vehicles, when employed in carrying sick or injured persons to hospitals or other places for relief or treatment, and the officers and policemen and vehicles of the police department shall have the right of way over all other persons and vehicles on any street, and through any procession, except over vehicles carrying the United States mail."

"Section 33: It shall be unlawful for the driver of any vehicle or the motorman of any street car in or upon any street in the city of Pasadena, or for any person standing or walking in any such street, to fail, refuse or neglect to

allow the right of way to any officer or fireman, or apparatus of the fire department, when the same is going to or on duty at, or returning from a fire, or to any ambulance, whether of public or private character, or to any other vehicle, when such vehicle is employed in carrying a sick or injured person to a hospital or other place for relief or treatment."

"Section 34: Upon the approach of any apparatus of the fire department or any police patrol wagon, or any ambulance, the driver of any vehicle or street car, in or upon any street shall immediately stop such vehicle as near as possible to the right-hand curb of such street, and it shall be unlawful for any such driver to cause or permit such vehicle to be moved until such apparatus, police patrol wagon or ambulance shall have passed such vehicle."

The first question for consideration is whether the general restrictions as to speed and turning of corners, applicable to vehicular traffic contained in the Motor Vehicle Act, apply to fire apparatus responding to a fire-alarm. Such apparatus is operated by the municipality in the exercise of its governmental functions.

It must be conceded that the language of the Motor Vehicle Act in fixing speed limits, and regulating the use of public streets, is broad enough to apply to a motor fire-truck responding to a fire-alarm. But a familiar and fundamental rule of construction requires that this general language shall not be construed to apply to the government or its agencies unless expressly included by name. The general rule is stated by Blackstone as follows: "I shall only further remark, that the King is not bound by any act of parliament unless he be named therein by special and particular words. The most general words that can be devised (any person or persons, bodies politic or corporate, etc.) affect him not in the least, if they may tend to restrain or diminish any of his rights or interests." (Blackstone's Commentaries, Book 1, p. 261.)

Chancellor Kent states the rule as follows: "It is likewise a general rule, in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication." (Kent's Commentaries, p. 460.)

Associate Justice Story of the supreme court of the United States, sitting in the first circuit in the case of *United States v. Samuel Hoar*, 2 Mason, 311, [Fed. Cas. No. 15,373], stated the rule as follows:

“Now, I think, it may be laid down as a safe proposition, that no statute of limitations has been held to apply to actions brought by the Crown, unless there has been an express provision including it. For it is said, that, where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, unless the statute is made by express words to extend to him. . . . And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments. . . .

“But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act. . . . ”

This rule has been frequently applied in this state. Most recently in the case of *Irillary v. City of San Diego*, 186 Cal. 535, [199 Pac. 1041], wherein it is held that a debt due from a municipality cannot be garnisheed in a suit by a private party, even though the debt was incurred by the city acting in its proprietary capacity; and in *Engebretson v. City of San Diego*, 185 Cal. 475, [197 Pac. 651], following *San Francisco etc. v. City and County of San Francisco*, 131 Cal. 356, [63 Pac. 665], holding that general provisions in regard to interest do not apply to municipalities, and in

*Slayden v. O'Dea*, 182 Cal. 500, 505, [189 Pac. 1066]. In *Berton v. All Persons*, 176 Cal. 610, 616, 617, [170 Pac. 151], it was held that the general language of the McEnerney Act does not apply to a city, although a judgment in such a case is expressly made "binding on the whole world." The language of that case is so appropriate to the discussion that we quote the following therefrom:

"It is apparent, therefore, that the binding and conclusive force of the earlier judgment as against the city and county of San Francisco must come, if it exists at all, from the fact that a judgment under the McEnerney Act, valid on its face, is a judgment *in rem* and so 'binding on the whole world,' unless and until set aside under familiar equitable principles.

"That the judgment here offered is valid upon its face cannot be disputed. As little may it be questioned but that such a judgment is conclusive upon all private rights and so is conclusive against all the rights of private persons, individuals, associations, and corporations whether in the judgment named or unnamed. Thus beyond question this previous judgment was binding upon all the private litigants in the present action.

"It is to be considered, however, what may be its binding force and effect upon the state itself and upon the state's public agencies and mandatories such as for some purposes municipal corporations always are. In brief, our inquiry is, What was the effect of this previous judgment upon the city and county of San Francisco present and objecting to its introduction as an estoppel against its own claim? Law is a rule of conduct dictated by the superior, the state, for the conduct and control of its people. It is only by its own grace that the state ever becomes subject to the operation of its own laws, and while in later governmental development the state frequently makes declaration that it will submit its own rights to determination in its own or other courts, yet, as such declarations are always in the nature of impairments of the sovereign power, this submission of the state is never inferred in favor of the private litigant, but must be found either actually expressed in an act or by fair intendment and interpretation to belong in the act. It is unnecessary to cite illustrations of this. They are too familiar. Suffice it to refer to the fact that title by adverse pos-

session as against the state can only be secured under such permissive law. The mechanic's lien law of universality in its operation does not apply to the land and buildings of the state.

“A reading of the McEnerney Act discloses not only a failure by the state to declare itself bound by decrees so obtained, but makes manifest that the statute was dealing only with the private rights of private persons. Giving to ‘persons’ its broad and indubitable meaning, the statute was dealing with the private rights of individuals, associations, copartnerships, and corporations other than public agencies acting in their public capacity. A sovereign state is not a person.”

Indeed, the rule has been so frequently applied in this state that we refrain from further comment on the cases, reference to which we now make. (*Whittaker v. County of Tuolumne*, 96 Cal. 100, [30 Pac. 1016]; *Reclamation Dist. No. 551 v. County of Sacramento*, 134 Cal. 477, 480, [66 Pac. 668]; *Ruperich v. Baehr*, 142 Cal. 190, 192, [75 Pac. 782]; *People v. San Joaquin Valley etc. Assn.*, 151 Cal. 797, 806, [91 Pac. 740], and cases cited therein; *People v. California Fish Co.*, 166 Cal. 576, 592, [138 Pac. 79]; *Westinghouse Electric Co. v. Chambers*, 169 Cal. 131, 139, [145 Pac. 1025].) This rule applicable to the interpretation of statutes is broad enough to cover municipal employees. As was aptly said in *Ruperich v. Baehr*, *supra*, concerning the garnishment of salaries of employees: “The state and its subordinate bodies perform their governmental functions through their officers and employees elected or appointed for that purpose. Therefore, any process of law which would tend to embarrass such officers or employees while in office, and hinder or distract them in the discharge of official duty, would injuriously affect the capacity of the state to perform its functions as much as, if not more than, the annoyance of having its funds subjected to garnishee process.”

[1] It follows that the general rules of the road relating to speed and to the turning of corners contained in the Motor Vehicle Act do not apply to fire or police apparatus. We have only to consider the utter absurdity of requiring peace officers to observe the arbitrary speed limits fixed by the Motor Vehicle Act when pursuing criminals, who may be fleeing in high-power cars at twice the legal limit, to

make manifest that the legislature did not have in view such a limitation on peace officers. And it is equally clear that they did not contemplate retarding the speed of fire apparatus in going to a fire.

The court of appeals of New York, in *Farley v. Mayor etc.*, 152 N. Y. 222, [57 Am. St. Rep. 511, 46 N. E. 506], held that the general language of section 1932 of the Consolidation Act (Laws 1882, c. 410, p. 470), prohibiting "any person" from driving any horse through any street "within the city of New York with greater speed than at the rate of five miles per hour," did not apply to fire apparatus going to a fire. The court merely observed that "It is manifest that section 1932 of the Consolidation Act can have no application to the speed at which engines or hose-carts connected with the fire department shall be driven when going to a fire. . . . Sec. 1932 was intended to regulate the speed of horses traveling on the streets and using them for ordinary purposes of travel, and from the nature of the exigency cannot apply to the speed of vehicles or the fire department on the way to fires." (See, also, *Oklahoma Ry. Co. v. Thomas*, 63 Okl. 219, [L. R. A. 1917E, 405, 164 Pac. 120].)

In some cases it has been held that either an implied exception must be read into local ordinances regulating speed in favor of the fire department or that the ordinance must be declared to that extent unreasonable and void. (*State v. Sheppard*, 64 Minn. 287, [36 L. R. A. 305, 67 N. W. 62]; *City of Kansas City v. McDonald*, 60 Kan. 481, [45 L. R. A. 429, 57 Pac. 123].) For the reasons above stated it is clear that the exception is implied, and that it is unnecessary to rely upon the doctrine that unreasonable ordinances are void, and that these cases in so far as they so hold support our conclusion as to the proper construction of our Motor Vehicle Act.

There is nothing in the cases cited by appellant opposed to our view as to the proper construction of our statute. These cases are *People v. Little*, 86 Mich. 125, [48 N. W. 693], a case involving the right of way of a private ambulance; *Knox v. North Jersey St. Ry. Co.*, 70 N. J. L. 347, [1 Ann. Cas. 164, 57 Atl. 423], involving the application of the common law to a collision with fire apparatus; *Woods v. Public Service Co.*, 84 N. J. L. 171, [85 Atl. 1016], involving the effect of a statute giving a right of way to fire



apparatus; *Morse v. Sweenie*, 15 Ill. App. 486, involving the construction of an ordinance expressly applying to fire apparatus; *Greenwood v. Philadelphia W. & Balt. R. R. Co.*, 124 Pa. 572, [10 Am. St. Rep. 614, 3 L. R. A. 44, 17 Atl. 188], involving a collision between a railway train at a railroad crossing and a fire engine; *Garrity v. Detroit Citizens' St. Ry. Co.*, 112 Mich. 369, [37 L. R. A. 529, 70 N. W. 1018], involving a consideration of the duty of a driver of a fire truck having the right of way by ordinance in approaching and crossing a street-car track; and *Birmingham Ry. & Elec. Co. v. Baker*, 126 Ala. 135, [28 South. 87], to the same effect; also, *Indianapolis T. & T. Co. v. Hensley* (Ind.), 105 N. E. 474, and *Coles v. New Orleans Ry. & Lt. Co.*, 133 La. 915, [63 South. 401], relating to right of way at crossings of street-cars and street intersections.

Having concluded that the speed limit and rules as to turning at corners do not apply to fire apparatus responding to an alarm, the next question is as to the effect of the statute and ordinance granting a right of way. It is evident that these provisions, under our view, are inserted to direct and control the operators of other vehicles upon the highway. At common law it is said no right of way was granted to fire apparatus. (*Knox v. North Jersey St. Ry. Co.*, 70 N. J. L. 347, [1 Ann. Cas. 164, 57 Atl. 423]), hence the necessity of statutory rules requiring the yielding of such right of way and such provisions are to be construed in the light of this situation.

Before further considering this subject it should be stated that the trial court instructed the jury that the driver of the fire truck was required to exercise reasonable care. The instructions on this subject are quite as favorable as the defendant was entitled to. Instructions 23, 24, 25, and 29 were given at the request of the defendant, as follows:

"23. Due regard to the safety of the public, required of those operating a fire truck on the public streets, means the exercise of reasonable care by them for the public safety. If the truck be driven at a higher speed than is lawful, or in a manner that is unusual to vehicles, such as cutting the corner, or on the left-hand side of the street, such unusual conduct must be accompanied by a commensurate degree of care on the part of those engaged in propelling the truck so that at all times due regard may be had to the public

safety. If unusual or extraordinary care is thus reasonably necessary, it must be given; and the omission thereof will constitute negligence."

"24. The law requires that any person operating or driving a motor vehicle (and this includes a fire truck) on the public highways, shall operate or drive same in a careful and prudent manner, and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and that no person shall operate or drive such motor vehicle on a public highway at such rate of speed as to endanger the life or limb of any person, or the safety of any property. A violation of this law would constitute negligence."

"25. No right of way exists in case of fire patrols, fire engines or fire apparatus while being operated as such, which is superior to due regard for the safety of the public; their right of way in operation on public streets must be exercised with due regard to the public safety. This means as much the safety of that portion of the public in street-cars or electric cars as that portion of the public otherwise lawfully on or using the streets."

"29. Defendant's motorman, in operating its car, was required to use only the care and caution which an ordinarily prudent and careful man would have exercised under similar circumstances, and if you find from the evidence that said motorman used such care and caution, then you cannot find defendant railway company negligent in respect to anything done by the said motorman."

These instructions certainly made the plaintiffs' right of way dependent upon a "*due regard to the safety of the public.*"

[2] It is evident that the right of way of fire apparatus over other vehicles is dependent upon "due regard to the safety of the public" only in so far as such "due regard" affects the person required to yield the right of way. Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus. This seems to have been the view of the trial court, for it instructed the jury as follows:

“5. If you believe from the evidence that the motorman of defendant’s car failed, refused and neglected to allow the right of way to apparatus of the fire department of the city of Pasadena, when said fire apparatus was going to a fire, *and that such motorman knew, or in the exercise of ordinary prudence should have known, of the approach of such fire apparatus,* in time to have allowed said right of way, and that by reason of such failure, refusal, and neglect to allow said right of way and as a proximate result thereof one of the plaintiffs was struck, injured or killed or suffered property damage without negligence on his or its part contributing to such injury, death, or damage, then you will find for that plaintiff.” (Italics ours.)

The appellant complains that its instruction No. 35, defining the ordinary care required of the occupants of the fire truck, was modified by the court by adding the portion in italics as follows: “under all the circumstances of the case including the circumstances above mentioned and including also the circumstance that they were entitled by law to the right of way.”

Appellant’s point is that the right of way is contingent upon the exercise of due care on the part of the driver of the fire truck. This instruction, as modified, taken in connection with instruction 25, above quoted, is as favorable as defendant was entitled to.

It should be stated that no question is raised in the briefs as to the relative authority of the state and city over the control of fire apparatus in the public streets of a chartered city (*Ex parte Daniels*, 183 Cal. 636, [192 Pac. 442]), and hence we have not discussed that question.

Appellant, in its reply brief, calls attention to the amendment of the Motor Vehicle Act by the legislature of 1919 (Stats. 1919, p. 218), whereby the legislature declares that the right of way therein accorded “shall not be construed as permitting the violation by the operators of any such vehicles of any of the provisions of section twenty-two of this act,” etc., and suggests that this points to the proper construction of the law in force in 1917. We cannot agree with this contention.

Under this view of the law and the facts, it is unnecessary to discuss appellant’s points, based upon the claim that the

defense of contributory negligence is available against the city, even if not so available against the injured persons.

Judgment affirmed.

Sloane, J., Lennon, J., Lawlor, J., Shaw, J., and Shurtleff, J., concurred.

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[Crim. No. 2366. In Bank.—November 7, 1921.]

**THE PEOPLE, Respondent, v. HOLMES F. TROUTMAN,  
Appellant.**

- [1] **CRIMINAL LAW—LEWD AND LASCIVIOUS ACT—SUFFICIENCY OF EVIDENCE.**—On this appeal from a judgment of conviction of violation of section 288 of the Penal Code, the testimony of the complaining witness is held not to be so inherently improbable as to be unworthy of belief, although it reveals an exceptional depth of moral degeneracy.
- [2] **ID.—CONSTRUCTION OF SECTION 288, PENAL CODE — ERRONEOUS REFERENCE.**—The reference to "Part Two" in section 288 of the Penal Code, making it an offense to commit any lewd or lascivious act "other than the acts constituting other crimes provided for in Part Two of this code," should be construed as a reference to "Part One," as the reference was either a legislative oversight or a clerical misprision.
- [3] **ID.—COMPLAINING WITNESS—ACCOMPLICE.**—In a prosecution for violation of section 288 of the Penal Code, the complaining witness cannot be an accomplice regardless of his mental capacity, moral insight, or acquiescence, where the defendant is over the age of fourteen years, since the gist of the offense is the crime against a child under the age of fourteen years.
- [4] **ID.—EVIDENCE—TESTIMONY OF COMPLAINING WITNESS—CORROBORATION.**—In a prosecution for violation of section 288 of the Penal Code corroboration of the testimony of the complaining witness is not required.
- [5] **ID.—ACTS COMMITTED AFTER AGE OF FOURTEEN YEARS—CORROBORATION.**—In a prosecution for violation of section 288 of the Penal Code corroboration is not required of the testimony of the complaining witness relating to the commission of similar acts by the defendant subsequent to the act charged and after the witness

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5. Age of alleged accomplice in sexual offense as affecting the necessity of corroboration of testimony, note, **L. R. A. 1915E, 1222.**

became of the age of fourteen years, admitted to show the disposition of the defendant to commit the act charged.

- [6] **ID.—LETTERS OF DEFENDANT—CONSTRUCTION—INSTRUCTION.**—In a prosecution for violation of section 288 of the Penal Code the defendant was not entitled to an instruction that the jury were to give an innocent construction to letters written by defendant to the complaining witness because the mother of the witness gave them such a construction when they were received and before she was informed of the alleged acts.
- [7] **ID.—OTHER OFFENSES—EFFECT OF PROOF—INSTRUCTION.**—An instruction that testimony had been introduced tending to prove other lewd acts for the purpose of proving the lewd and lascivious disposition of the defendant, and not to prove distinct offenses, but such evidence was corroborative evidence tending to support the offense charged, was not erroneous.
- [8] **ID.—JURY—EXERCISE OF PEREMPTORY CHALLENGES—DEPARTURE FROM CODE PROCEDURE—LACK OF PREJUDICE.**—A defendant cannot complain of an alleged violation of section 1088 of the Penal Code, which provides that first the people and then the defendant shall take a peremptory challenge, by the action of the court in permitting the district attorney to exercise one peremptory challenge after passing his challenge several times, where the defendant after exercising nine of his peremptory challenges, leaving one unexercised, and the state exercising only the one challenge, expressed satisfaction with the jury.

**APPEAL** from a judgment of the Superior Court of Alameda County. James G. Quinn, Judge. Affirmed.

The facts are stated in the opinion of the court.

Ostrander & Carey for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

**LENNON, J.**—The order granting a rehearing of this case was prompted by the earnest and persuasive petition for a rehearing after decision by the district court of appeal. Here, as in the court of appeal, a reversal was sought primarily upon the contention that the evidence adduced in support of the people's case was so inherently improbable as to be unworthy of belief, and, therefore, insufficient to support the jury's verdict of guilty. Accordingly, we have, in addition to giving due consideration to the remaining

points made in support of the appeal, painstakingly reviewed and considered in every detail the evidence adduced upon the whole case, with the result that we are constrained to hold, as did the district court of appeal, that the evidence is sufficient to support the verdict and judgment.

[1] Conceding, as is contended, that at the time of the commission of the crime charged the physical condition of the boy, not necessary to be detailed here, upon whose person the crime charged was found by the jury to have been committed by the defendant, who was so diseased as to be abhorrent and, therefore, was calculated to repulse, rather than arouse, the unnatural lascivious desires even of an extremely morally degenerate man, nevertheless we are not satisfied that the evidence upon which the conviction was had is so inherently improbable as to be altogether unworthy of belief. While the testimony of the complaining witness concerning the details of the commission of the crime is so out of the ordinary in its revelation of revolting details as to be startling in the extreme and difficult to believe, still it cannot be held to be unbelievable merely because it reveals an exceptional depth of moral degeneracy. To so hold would be "purely a speculative attempt to sound the depths of human depravity and assign arbitrary rules beyond which desire and passion are held to be incapable of seducing or impelling human nature." (*People v. Von Perhacs*, 20 Cal. App. 48, [127 Pac. 1048]; *Stout v. State*, 22 Tex. App. 339, [3 S. W. 231].) It will be unnecessary to prolong a discussion of this phase of the case, for, apart from what we have said, we are satisfied that the case is adequately dealt with in so far as the sufficiency of the evidence is concerned and correctly decided from every point of view by the district court of appeal in the opinion of Mr. Presiding Justice Langdon, which we quote and adopt as follows:

"This is an appeal by the defendant from a judgment of conviction of violation of section 288 of the Penal Code. A motion for a new trial was denied, from which order an appeal is also taken.

"A discussion of the facts does not seem to us necessary, and in view of the nature of the testimony, detailed consideration of the evidence will not be made in this opinion. It is sufficient to say that the evidence has been read with

care and that we cannot agree with the appellant that the testimony of the boy against whom the crime is alleged to have been committed presents such inherent improbabilities as to entitle it to no credence as a matter of law, and thus leave the record with no legal evidence to sustain the conviction. It is, of course, true that all offenses under this section, by their very abnormality, are improbable measured by the standard of the normal; but the observation and experience of any court handling criminal records demonstrates that many such cases do occur, and their facts are, therefore, not inherently improbable, as that phrase is used in the law. As to the especially revolting facts in this case in connection with the alleged acts, which are urged by appellant as making the testimony of the boy unbelievable and inconceivable, it is sufficient to observe that once a man slips away from normal, once he enters the uncharted region of abnormality, the details and depths of degradation which his actions will show can no longer be measured. For the normal man, we have a standard from human experience; but for the abnormal, there are no rules of conduct. The argument of inherent improbability was doubtless made to the jury, where it was a proper one, but these men and women believed the testimony of the boy, and even under the unusual conditions shown by the evidence did not find the facts unbelievable. We cannot, therefore, as a matter of law, say that the revolting conditions surrounding the abnormal acts in this case render the commission of them by the defendant inherently improbable.

[2] "Objection is made by appellant that no crime is charged in the information against the defendant, because section 288 of the Penal Code is unconstitutional upon the ground that it is vague, ambiguous, indefinite, and uncertain. The specific objection to the section is that the language, 'Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part two of this code,' etc., is unintelligible in that 'Part Two' of the code referred to relates solely to criminal procedure and does not describe acts constituting other crimes. This precise objection was considered in the case of *People v. Bradford*, 1 Cal. App. 42, [81 Pac. 712], where the court said that it was evident that either by legislative oversight or by clerical misprision the words 'Part



Two' were inserted for the words 'Part One' in such section, and that it should be so construed. Appellant refers to this case in his brief, but asks this court to overrule it. We see no justification for so doing, and we consider the question of the validity of this section, against such an attack, as settled in this state.

[3] "Appellant makes various objections to instructions given and refused by the trial court. His main objection is that the evidence shows the prosecuting witness to be an accomplice, regardless of his age, because of his intelligence, education, and understanding of moral questions, and that the refusal of the court to leave the question of whether or not the boy was an accomplice to the jury, and to instruct the jury that if they so found, his testimony would require corroboration to sustain a conviction, was prejudicial error. Much argument is indulged in by the appellant regarding the law relating to accomplices, and the responsibility of minors for crimes, etc. We are of the opinion that none of the rules discussed governing these matters are applicable to a case such as the present one. The inquiry here is not at all as to the guilt or moral responsibility of the child, and under the section of the code under which the conviction here was had, the minor is guilty of no legal offense, regardless of his mental capacity or moral insight and regardless of his acquiescence. A different situation might exist if the defendant here was of the age of thirteen years and charged with any act included in section 288 against 'a child under the age of fourteen years.' Then the question of the defendant's knowledge of right and wrong would be important. It would be a question of fact, and the disputable presumption regarding the responsibility of infants between the ages of seven and fourteen years for crimes might be rebutted by the evidence. But the gist of the offense under section 288 is the crime against a 'child under the age of fourteen years,' and in the present case, the prosecuting witness, even if it were overwhelmingly proved that he had full knowledge of right and wrong and that he had innumerable vicious and criminal tendencies himself, and that he had suggested to the defendant (a man of thirty-eight years of age) the commission of the act charged against said defendant, yet he would not be guilty of an offense under sec-

tion 288, for the gist of that offense is that the act is committed with one under the age of fourteen years.

[4] "Section 1111 of the Penal Code, while requiring the testimony of an accomplice to be corroborated in order to sustain a conviction, expressly defines an accomplice as 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' However, in addition to the foregoing reasons, it has been expressly decided in this state, in the case of *People v. Raich*, 26 Cal. App. 286, [146 Pac. 907], that there is no statute or other rule of law which calls for the corroboration of the testimony of a complaining witness in a case of this character. Also, in the case of *People v. Thourwald* (Cal. App.), 189 Pac. 124, it is said, in considering a conviction under this same section: 'Upon her testimony [the prosecutrix] alone a verdict of conviction may securely rest,' and it is then pointed out that no corroboration is required in cases of rape, and that the same rule applies to cases under section 288 of the Penal Code. Furthermore, there is some corroboration of the boy's testimony in the letters appearing in the record which were written to him by the defendant from time to time. The appellant contends that under certain cases in this state, such corroborating evidence is insufficient. But be that as it may in a case where corroboration is required—under the ruling in the cases of *People v. Raich* and *People v. Thourwald*, *supra*, corroboration of the testimony of the prosecuting witness is unnecessary in a case like the present one, and, therefore, we are not concerned with whether or not the possible inference which the jury might draw from the letters would have sufficiently corroborated the boy's story.

[5] "A somewhat different, though a closely related, proposition to the one just discussed is involved in the further contention of counsel that testimony of the boy relating to the commission of similar acts by the defendant subsequent to the act charged, and after October 30th, when the boy became fourteen years of age, was improperly admitted to show the disposition of the defendant to commit the act charged. It is appellant's contention that even though it be held that the boy was not an accomplice while he was under the age of fourteen years and while he came within the scope of section 288 of the Penal Code, nevertheless,

as to acts committed after he reached the age of fourteen years, he would be an accomplice, and as to such acts, at least, the court should have instructed the jury that his testimony must be corroborated. There is no merit in this contention, as it was not necessary to prove any offense except the one selected by the district attorney as the charge upon which the state relied for a conviction. The instruction given by the court, of which complaint is made, did not refer to other 'crimes,' but referred to other 'acts' which it was stated were introduced to show the disposition of the defendant to commit the act charged, and as corroborative evidence of the main charge.

[6] "Reference has been made herein to certain letters written by the defendant to the prosecuting witness. These letters were introduced in evidence, and appellant contends that the jury should have been instructed specifically that they must give the letters an innocent construction for the reason that the mother of the boy saw these letters as they were received by him, and gave to them an entirely innocent construction. We do not see how the jury could be bound by the construction given to the letters by the mother before she was in possession of the information given by her son's testimony. The letters are not isolated from all other facts when being construed by the jury; they are interpreted in the light of all the other testimony in the case. It is perfectly clear from the record that when the mother was informed by her son of the alleged acts, she no longer gave to the letters of the defendant an innocent construction, but that, thereupon, such letters became exceedingly significant to her. We see no error in the action of the trial court in permitting the letters to go to the jury.

[7] "Complaint is made of the following instruction: 'Testimony has been introduced by the prosecution tending to prove other acts of lewd and lascivious conduct of the defendant toward Herbert Cramer, prior to and subsequent to the acts relied upon for conviction. This evidence is introduced for the purpose of proving the lewd and lascivious disposition and tendency of the defendant to commit the lewd and lascivious acts. This evidence is not introduced to prove distinct offenses but is corroborative evidence tending to support the one specific offense for which the defendant is being tried.' Appellant contends that this instruction

positively asserts the existence of a fact, i. e., that the proof of similar offenses is corroborative of the main charge. Practically the same instruction was approved in the case of *People v. Gasser*, 34 Cal. App. 541, 544, [168 Pac. 157]. Certainly it is well recognized that in cases of this character, evidence of similar acts tending to prove a lewd and lascivious disposition and the tendency of the defendant to commit lewd and lascivious acts would be corroborative of the specific charge. There is nothing in this instruction, nor in the other instructions, which would prevent the jury from disbelieving the entire testimony of the prosecuting witness, both as to the main charge and the other offenses tending to show a lascivious disposition; and we think that appellant's contention that this instruction is, in effect, a direction to the jury to find the defendant guilty is without merit.

"Numerous objections are made with reference to other instructions of the trial court. It can serve no useful purpose to consider, specifically, each of these. The instructions as a whole must be read together, and after such reading, we are convinced that no error prejudicial to the defendant was made. Under the instructions, taken as a whole, his rights were fully protected. The simple fact is that the jury believed the story of the boy and did not believe the story of the defendant. There is no other direct evidence upon the charge. We do not think it can be said that the evidence was such that reasonable men could not have reached the conclusion arrived at in this case.

[8] "It is further urged by the appellant that error was committed in selecting the jury in this case, and that the trial court should have required the district attorney to exercise his peremptory challenge before the defendant was called upon to exercise his challenge. The district attorney was permitted to pass his peremptory challenge on several occasions, and after passing his challenge more than five times, was permitted to exercise one peremptory challenge. Appellant contends that this is a violation of section 1088 of the Penal Code, which provides that 'first the people and then the defendant shall take a peremptory challenge.' Section 1404 of the Penal Code provides that 'neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor any error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in

respect to a substantial right.' If an error in procedure was committed by this practice of the trial court, we fail to see how such an error tended to the prejudice of the defendant, and, certainly, there is no showing made of any actual prejudice suffered by him therefrom.

"Furthermore, it appears from the record that defendant exercised only nine of his peremptory challenges, thus leaving one unexercised. The state exercised only one such challenge. The record shows that after these challenges were exercised the attorney for the defendant stated: 'We are satisfied,' whereupon the district attorney stated: 'So are we.' It appears, therefore, that the defendant had an additional challenge unexercised which he did not desire to use because the jury as constituted was satisfactory to him. Under such circumstances, he cannot complain here of any irregularity, if irregularity there was, in allowing his peremptory challenge to the people. It was held in *Baird v. Duane*, 1 Cal. Unrep. 492, that error in refusing to allow a challenge for cause is not prejudicial if the party, although forced thereby to use a peremptory challenge, has a peremptory challenge to spare when the jury is completed. It was held in the case of *People v. Schafer*, 161 Cal. 573, [119 Pac. 920], that the disallowance of a challenge for cause on the ground of actual bias, interposed to a juror who was subsequently peremptorily challenged, will not be reviewed on appeal for error, where the record, while it shows that the defendant exhausted his ten peremptory challenges, including the one used on such juror, fails to show that he had occasion or desire to use an additional peremptory challenge, or that each and all of the twelve jurors finally accepted and sworn were not entirely satisfactory to him. The reason for the rule announced in the last cited case, and the full discussion of the subject therein, apply with equal force in the present case. The defendant having expressly stated that the jury was satisfactory to him, and having one of his peremptory challenges unexercised at the time the jury was accepted, his objection here is without merit.

"We find no errors in the record which would warrant a reversal of this judgment under all the facts in evidence, and the same is affirmed."

Wilbur, J., Shurtleff, J., Lawlor, J., Angellotti, C. J., Sloane, J., and Shaw, J., concurred.

[S. F. No. 9998. In Bank.—November 8, 1921.]

In the Matter of the Estate of SILVIS H. CHEDA, Deceased. GEORGE A. CHEDA, etc., Appellant, v. ELENORE A. CHEDA, Respondent.

[1] **APPEAL—CONTRACT BY DECEASED PERSON—PERFORMANCE BY EXECUTORS—APPEALABLE ORDER.**—An order made under section 1597 et seq. of the Code of Civil Procedure directing the executors of a will to transfer and deliver to a third party certain assets of the estate, based on a contract for the sale thereof alleged to have been made by the testator, is an appealable order, although not specified as such in subdivision 3 of section 963 of the Code of Civil Procedure, specifying the probate judgments and orders from which an appeal may be taken.

[2] **ESTATES OF DECEASED PERSONS—PROCEEDING FOR ENFORCEMENT OF CONTRACT—NATURE OF JUDGMENT.**—The proceeding authorized by section 1597 of the Code of Civil Procedure is practically a proceeding in equity terminating in a final judgment having the full force and effect of a final judgment in an action for specific performance of a contract.

**MOTION** to dismiss an appeal. Denied.

The facts are stated in the opinion of the court.

Henry E. Greer and Thos. P. Boyd for Appellant.

Jos. K. Hawkins for Respondent.

**THE COURT.**—Motion to dismiss appeal from order on ground that the same is not an appealable order.

The order was one made by the superior court under section 1597 et seq. of the Code of Civil Procedure, directing the executors to transfer and deliver to a third party certain assets of the estate, being certain shares of bank stock. The application for the order and the order were based on a contract for the sale thereof alleged to have been made by the deceased.

[1] The claim that the order is nonappealable is based on the fact that such an order is not specified as an appealable order in the statute specifying the probate judgments and orders from which an appeal may be taken. (Code Civ.

Proc., subd. 3, sec. 963.) If the order here were exclusively a probate order there would be much force in the claim.

[2] We are of opinion, however, that the proceeding authorized by section 1597 et seq. is in substance more than this, being practically a proceeding in equity terminating in a final judgment, having the full force and effect of a final judgment in an action for specific performance of a contract. As such we deem the order made therein a final judgment, appealable under subdivision 1 of section 963 of the Code of Civil Procedure.

It was for this reason that the motion to dismiss the appeal was denied from the bench.

Angellotti, C. J., Wilbur, J., Shaw, J., Sloane, J., Shurtleff, J., Lawlor, J., and Lennon, J., concurred.

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[S. F. No. 9333. In Bank.—November 8, 1921.]

NELLIE JOHNSTONE, Appellant, v. PANAMA PACIFIC INTERNATIONAL EXPOSITION COMPANY (a Corporation), Respondent.

[1] NEGLIGENCE — PUBLIC EXPOSITION — SAFE CONDITION OF GROUNDS AND THOROUGHFARES.—A duty is imposed upon a company conducting a public exposition to use ordinary care to keep its grounds, including the thoroughfares, in a safe condition for its invitees, even if there is no duty, as matter of law, resting upon it to provide separate thoroughfares for vehicles and pedestrians.

[2] ~~ID.~~—INJURY TO EXPOSITION VISITOR—ACT OF BAILEE OF CONCESSIONAIRE—PLEADING—SUFFICIENCY OF COMPLAINT.—A complaint in an action against an exposition company for damages for personal injuries received by a visitor while walking along one of the thoroughfares used by pedestrians, from being struck by an

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1. Duty of owners and managers of exhibitions and places of amusement as to safety and protection of patrons, notes, 5 Ann. Cas. 926; 15 Ann. Cas. 517; Ann. Cas. 1915B, 546; Ann. Cas. 1917D, 931, 933; Ann. Cas. 1918E, 1073.

2. Liability of one maintaining a place of amusement to which public are invited for negligence of concessionaire, notes, 14 L. R. A. (N. S.) 284; 32 L. R. A. (N. S.) 717; L. R. A. 1915F, 696.



electric carriage operated by another visitor and rented from a concessionaire, states a cause of action, where it is alleged, in addition to the failure to provide separate thoroughfares for pedestrians and electric cars, that the defendant was negligent in the granting of the concession, the granting of permission to operate it, and the granting of permission to the concessionaire to allow persons unskilled in the operation of such cars to operate them upon the grounds among the pedestrians.

[3] **BAILMENT—NEGLIGENCE OF BAILEE—LIABILITY OF BAILOR.**—The rule that a bailor is not liable to a third person for injuries caused through the negligent use of the bailment is not applicable where the bailor is under a duty to use ordinary care to protect the third person from injury.

[4] **NEGLIGENCE—DANGEROUS NATURE OF CONCESSION—KNOWLEDGE OF EXPOSITION COMPANY—LIABILITY TO INVITEE.**—An exposition company is liable for injuries received by an invitee from the operation by another invitee of an electric carriage, which the latter had rented from a concessionaire, where the vehicle was a dangerous appliance when in the hands of one unskilled in its management and the company had knowledge of such fact.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Bernard J. Flood, Judge. Reversed.

The facts are stated in the opinion of the court.

Wm. M. Abbott, Wm. M. Cannon, J. L. Taugher and Kingsley Cannon for Appellant.

Myrick & Deering and James Walter Scott for Respondent.

**LAWLOR, J.**—This is an appeal by the plaintiff from a judgment in favor of the defendant, sustaining a demurrer to the complaint without leave to amend, in an action to recover damages for personal injuries.

Appellant was a visitor at the Panama Pacific International Exposition on April 17, 1915. She had purchased a ticket entitling her to admission, and was inside the grounds. Another visitor, operating an electric carriage rented from a concessionaire, ran into appellant and inflicted the injuries complained of.

The complaint contained two counts or alleged causes of action. The material allegations of the first were that re-

spondent invited crowds to purchase tickets and enter the grounds and thoroughfares of the Exposition, and thereby assumed the duty of providing safe thoroughfares as far as possible by the exercise of ordinary care; that in response to respondent's invitation, appellant purchased a ticket and entered the grounds, thereby becoming an invited guest of respondent; that within the grounds were certain thoroughfares used by visitors for traveling on foot; that these thoroughfares were generally crowded and visitors were permitted there by respondent; that prior to the date of the injury complained of, respondent had negligently granted to the Miniature Motor Vehicle Company the concession of operating its motor vehicles upon the thoroughfares mentioned; that the vehicle company permitted visitors to operate electrically propelled vehicles upon the thoroughfares; that respondent negligently allowed the vehicle company to conduct its concession, negligently permitted it to allow visitors unskilled in the operation of the vehicles to operate them among the pedestrians without providing a suitable pathway for them; that by these acts the thoroughfares were rendered highly dangerous to the pedestrians, and that respondent failed to provide safe thoroughfares for its invitees; that on April 17, 1915, without any negligence on her part, one of the Miniature Motor vehicles ran into appellant while she was within the Exposition grounds; that serious injuries were inflicted on her, whereby she sustained damages in the sum of \$102,714.55.

The second count or cause of action alleged similar facts concerning the relation of invitor and invitee between the parties, and the circumstances of the accident; that respondent made the Miniature Motor Vehicle company its agent for the purpose of transporting visitors by means of electrically propelled vehicles; that the vehicles were dangerous appliances when placed in the hands of persons unskilled in their management; that respondent and its agent, the vehicle company, were aware of this; that on April 17, 1915, the vehicle company negligently entrusted one of the vehicles to a visitor who was unskilled in its management, without inquiring as to his competency to operate it upon the thoroughfares mentioned; that because of the driver's ignorance of the proper operation of the vehicle and lack of skill as to its proper management, and because of the negligence of

respondent in putting the driver in charge of the vehicle without instructing him concerning its operation, the driver was unable to stop the vehicle; and that because of such negligence he ran into appellant, causing the injuries.

Respondent demurred to the complaint on the ground that neither the complaint nor either count stated a cause of action, and that it was uncertain, ambiguous, and unintelligible in some nineteen particulars. Only the first of these—that it does not state a cause of action—is urged on this appeal.

Appellant asserts: "It is well established that there are but three elements necessary to sustain an action for personal injuries: (1) The existence of a duty on the part of defendant to protect plaintiff from the injuries complained of; (2) The failure of defendant to perform that duty; and (3) An injury to the plaintiff from such breach of duty by the defendant. When these elements are brought together they unitedly constitute actionable negligence. [Citing cases.] It is respectfully submitted that the first count of plaintiff's complaint clearly and unambiguously alleged all of these requisite elements," and that "The second cause of action likewise sufficiently alleged defendant's duty, its breach thereof, and an injury to plaintiff proximately caused thereby." Respondent's position is thus stated: "To summarize, this defendant and respondent is charged with negligence in two particulars: First: That it failed to provide separate paths for vehicles and pedestrians; second: That its concessionaire entrusted one of its chair cars or 'electrically propelled' vehicles to a guest without inquiring into his competency, and that generally as a result of failing to provide separate passageways and as a result of its concessionaire's failure to make proper inquiry into the qualifications of the guest, the defendant and respondent company was liable for the damages that ensued," that "nowhere in the decisions of our courts, or in the brief of our opponent, can there be found the slightest precedent that might justify a ruling that an exposition company must, as a matter of law, maintain separate paths for pedestrians and vehicles," and that "the authorities are uniform in holding that one who leases a vehicle to another is not responsible for the latter's negligent act."

In 2 Cooley on Torts, third edition, page 1410, it is said: "1. The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been

performed. . . . 2. The duty being pointed out, the failure to observe it is to be shown; in other words, the existence of negligence."

In *Thornton v. Maine State Agr. Society*, 97 Me. 108, [94 Am. St. Rep. 488, 53 Atl. 979], plaintiff's intestate was a visitor at a fair conducted by defendant, and was standing on a railroad platform immediately outside the inclosing fence. He was killed by a bullet from a shooting-gallery operated as a concession inside the fair-grounds by one White. Deceased's widow sued under a statute which allowed recovery of damages for the death of a person caused by the wrongful act, neglect, or default of another. The court held: "It is too well settled to need the citation of authorities that, if the owner or occupier of land either directly or by implication induces persons to come upon his premises, he thereby assumes an obligation to see that such premises are in a reasonably safe condition, so that the persons there by his invitation may not be injured by them or in their use for the purpose for which the invitation was extended.

"Therefore, having invited the public to its fair, it was the duty of the defendant to use reasonable care to keep its grounds, and the usual approaches to them, so far as the approaches were under its control, in a safe condition, safe for all who were invited. It was its duty to use reasonable care that there should be no traps or pitfalls into which the invited might fall, and that there should be no dangerous plays or sports or exhibitions by which the invited might be injured. . . . The defendant would not be relieved from this duty by leasing portions of its grounds to the proprietors of shows and attractions, and becoming their landlord. As between it and the invited public, the duty still remained of using reasonable care to see that all of the exhibition grounds were safe. It was its duty so to do both in the original letting of space, and in the subsequent inspection and supervision of the show thus permitted to give its exhibition, or of the shooting-gallery thus permitted to operate as a part of the fair."

In *Whyte v. Idora Park Co.*, 29 Cal. App. 342, [155 Pac. 1018], the question was presented whether the amusement company was liable for an injury received by an invitee while patronizing a concession. The claim was made that the concessionaire was an independent contractor and that

therefore the amusement company was not liable. The court said: "There are some cases which support this theory advanced by the appellant, but we think the weight of authority sustains the proposition that one conducting a place of amusement will not be relieved from liability for injury to a patron merely because it was caused by the negligence of a concessioner or his employee." In the same case, the court quoted the following from *Stickel v. Riverview Sharpshooters' Park Co.*, 250 Ill. 452, [34 L. R. A. (N. S.) 659, 95 N. E. 445]: "While there are some decisions to the contrary, the greater weight of authority is that the owner will not be relieved from responsibility because the exhibition is provided and conducted by the concessioner, provided it is of a character that would probably cause injury unless due precautions are taken to guard against it; and this duty applies not to construction alone, but to management and operation where the device is of a character likely to produce injury unless due care is observed in its operation."

*Selinas v. Vermont State Agr. Society*, 60 Vt. 249, [6 Am. St. Rep. 114, 15 Atl. 117] was a case where a visitor at a fair was injured by being hit in the leg by a mallet used by another visitor in testing his strength on a striking-machine which was operated as a concession. The court said: "As the defendants were holding a public exhibition in this park, and inviting visitors thereto, it was their duty to render it a reasonably safe place for all persons who might lawfully be there in attendance. . . . Whether it [the machine] was dangerous or not depended upon its construction and the manner in which it was used. These were questions of fact, or at least mixed questions of law and fact, which could not properly have been decided by the court."

In *Schmidt v. Bauer*, 80 Cal. 565, [5 L. R. A. 580, 22 Pac. 256], the injured party entered a saloon conducted by the defendant and, mistaking one door for another, fell into a cellar, as a result of which he was injured. We quote: "The appellant also contends the court below erred in overruling his demurrer to the complaint. We think the complaint was sufficient. It alleges that the plaintiff was at the place where the accident occurred to [do] business with and at the invitation of the defendant. This was sufficient to show the duty on the part of the defendant, as between the parties, of keeping the premises in safe condition."

[1] We are of the opinion that, in the light of these authorities, the complaint alleged facts sufficient to constitute a cause of action. Even if it be true, as respondent insists, that there was no duty, as matter of law, resting upon it to provide separate thoroughfares for vehicles and pedestrians, there was a duty imposed upon respondent to use ordinary care to keep its grounds, including the thoroughfares, in a safe condition for its invitees, and the complaint alleged that respondent was under this duty. The complaint does not limit the violation of the duty to the failure to provide separate thoroughfares for pedestrians and electric cars. [2] The granting of the concession, the granting of permission to operate it, the granting of permission to the vehicle company to operate its cars, and the granting of permission to it to allow persons unskilled in the operation of the cars to operate them upon the grounds among the pedestrians, are all alleged to constitute negligence. As was held in *Whyte v. Idora Park Co.*, *supra*, and the other cases we have quoted, the fact that the injury was inflicted by a concessionaire and not by the proprietor would not relieve the latter of responsibility for the negligent acts which resulted in the injury, and as was declared in *Thornton v. Maine State Agr. Society*, *supra*, it was the company's duty to use reasonable care "both in the original letting of space, and in the subsequent inspection and supervision" of the concession. It requires no citation of authority to support the proposition that, whether or not acts were committed which would constitute a breach of duty was a question of fact for the jury. It thus appears that facts sufficient to state a cause of action were alleged.

[3] In support of respondent's contention that it is not liable in any event for appellant's injuries, for the reason that it was a bailor of an electric car, many authorities are cited to the effect that a bailor of a machine is not liable for injuries caused through its use by a bailee. However, these authorities are not in point, for the reason that they relate to the ordinary case of bailment of a machine with a resulting injury to a third person, a stranger. In this case it was alleged that the bailor was under the duty to use ordinary care to protect appellant from injury. It may well have been, and it was so alleged in the complaint, that the mere fact of giving the machine to the bailee for operation among

pedestrians was an act of negligence and a breach of the duty.

[4] It was further alleged that the cars were dangerous appliances when in the hands of one unskilled in their management; that respondent and the vehicle company knew this; that respondent negligently entrusted one of them to an unskilled person; and that by reason of his ignorance the accident in question resulted. In view of these allegations whether or not the car was a dangerous machine became a question for the jury to decide. (*Selinas v. Vermont State Agr. Society, supra.*) If it were found to be a dangerous machine, respondent would be liable, for in *Long v. John Breuner Co.*, 36 Cal. App. 630, 634, [172 Pac. 1132, 1133], the court upheld instructions by the trial court to the effect that "the defendant, being engaged in conducting a merchandise store which it invited the public to patronize, the duty rested upon it to keep the entrances and passageways to and from the premises as so occupied and used by it in a safe condition, . . . that 'if you find that said entrance or passageway [the entrance or passageway where the plaintiff here was injured] was in an unsafe or dangerous condition, and that such condition was the proximate cause of said injuries to plaintiff, defendant is liable therefor if its managers, officers, or agents knew of such alleged unsafe or dangerous condition, or if, as careful and prudent men, they should have known it, provided that plaintiff was in the exercise of ordinary care.'" This conclusion also disposes of respondent's contention that "So long as the Exposition Company might lawfully allow automobiles and other vehicles to enter its grounds and be driven therein, it must follow that the negligence of the driver of such vehicle cannot be imputed to it unless some relation of principal and agent be shown," for if it were shown that respondent knew of such alleged dangerous character of the car, it would be liable for injury resulting to appellant, an invitee, from its operation.

The complaint having alleged that a duty was owing to appellant by respondent, that there was a breach thereof, and that the injury was the result of this negligence, it was sufficient.

Judgment reversed.

Wilbur, J., Lennon, J., Sloane, J., Shaw, J., Shurtleff, J., and Angellotti, C. J., concurred.



[Sac. No. 3233. In Bank.—November 10, 1921.]

**SUTHERLAND H. JONES, Petitioner, v. GEORGE M. DE SHIELDS, as Auditor, etc., Respondent.**

- [1] **COUNTIES—CHARTER—CONSTITUTIONAL LAW.**—While a county charter should be consistent with the constitution, the whole charter cannot be declared null and void because it may contain certain provisions that are inconsistent with the constitution at the time of its adoption.
- [2] **ID.—CHARTER OF COUNTY OF TEHAMA—FAILURE TO PROVIDE FOR DEPUTY COUNTY CLERKS—VALIDITY.**—The charter of the county of Tehama adopted pursuant to section 7½ of article XI of the constitution is not totally invalid because it contains no provision for the fixing and regulation, by the board of supervisors, of the manner of appointment and removal, the number, or the compensation of deputy county clerks, as required by such section of the constitution.
- [3] **ID.—APPOINTMENT AND COMPENSATION OF DEPUTY COUNTY CLERK—APPLICABILITY OF GENERAL LAW.**—In view of the provisions of section 7½ of article XI of the constitution, relating to county charters superseding general laws as to matters provided for in such charters, the general law contained in section 4266 of the Political Code empowering the county clerk to appoint his own deputy and fixing the compensation for such deputy is applicable to the county of Tehama and has not been superseded by the county charter, which contains no valid provision for either the appointment or compensation of such deputy.

**APPLICATION** for a Writ of Mandamus to compel a county auditor to draw a salary warrant. Granted.

The facts are stated in the opinion of the court.

F. L. Butterway for Petitioner.

M. J. Cheatham, District Attorney, for Respondent.

**LAWLOR, J.**—Petitioner seeks a writ of mandate directed to respondent as auditor of Tehama County, commanding him to draw a warrant upon the county treasurer for the payment of petitioner's salary as chief deputy county clerk for the month of November, 1920.

The facts are not in dispute. Petitioner on April 5, 1920, was appointed by the county clerk of Tehama County to the

position of chief deputy county clerk. The appointment was made in writing, which was filed in the office of the county clerk, and petitioner took the oath of office. From April 5 to December 1, 1920, petitioner performed the duties of the office and regularly on the first of each and every month drew his salary of one hundred dollars for the previous month. On the latter date, respondent refused to draw his warrant for petitioner's salary for the month of November, and petitioner sued for a writ of mandate in the district court of appeal for the third appellate district. The writ was issued. A petition for a hearing of the matter in this court was granted.

The county of Tehama adopted a freeholders' charter pursuant to section 7½ of article XI of the constitution, which was subsequently ratified by the legislature (Stats. 1917, p. 1877). The said section requires that charters adopted under it shall provide: "5. For the fixing and regulation by boards of supervisors, by ordinance, of the appointment and number of assistants, deputies, clerks, attachés and other persons to be employed, from time to time, in the several offices of the county, and for the prescribing and regulating by such boards of the powers, duties, qualifications and compensation of such persons, the times at which, and the terms for which they shall be appointed, and the manner of their appointment and removal." It declares, further, that the charter "may provide as follows: For officers other than those required by the constitution and laws of the state, or for the creation of any or all of such offices by boards of supervisors, for the election or appointment of persons to fill such offices, for the manner of such appointment, for the times at which and the terms for which such persons shall be so elected or appointed, and for their compensation, or for the fixing of such compensation by boards of supervisors."

The Tehama County charter contains no provision for the fixing and regulation, by the board of supervisors, of the manner of appointment or removal, the number, or the compensation of deputy county clerks. In fact, deputies and assistants of elective officers are excepted from the list of such officers as are to be appointed by the supervisors. The charter does provide for a county clerk, who is to be elected, and who is to be *ex-officio* recorder. It also provides

that "Each county officer shall have the powers and perform the duties now or hereafter prescribed by General Law as to such officer, except as otherwise provided by this charter, and shall have and perform such other powers and duties as are or shall be prescribed by this charter." There is no provision that the county clerk or any other officer may appoint his deputies. The position of chief deputy county clerk is not expressly created, but in section 2 of article IV, concerning salaries, it is provided that the county clerk's "chief deputy shall receive one thousand two hundred dollars per annum." The board of supervisors has never created the position of chief deputy county clerk or provided compensation for such office.

Petitioner contends that it was the intention of the framers of the charter to make the office of chief deputy county clerk and recorder of Tehama County a special office, and that as such it would not be subject to change in any way except by a vote of the electors, amending the charter; that section 4266 of the Political Code, providing salaries for officers of counties of the class within which Tehama County falls, has been superseded by the charter and that therefore he is entitled to his salary under the charter provision; but that if it be held that petitioner is not legally entitled to his salary under the charter, then section 4266 of the Political Code must be applied, and that he would be entitled to his salary for November, 1920, under that section.

Respondent asserts: "Our claim is that in attempting to fix or limit the salaries of deputies directly by the charter and by not making any provision for the board of supervisors to so fix such salaries, the framers of the charter exceeded their authority and that so far as the charter purports to fix such salaries of deputies that portion of the charter is unconstitutional."

Respondent further states that "Since subdivision 5 provides for the fixing and regulation by the supervisors by ordinance of the appointment and number of assistants, deputies, etc., and for their qualifications and compensation, and the Tehama County charter contains no provision for such method of prescribing the compensation of the deputies in the several offices of the county of Tehama, we claim that the board of supervisors would be authorized to make the provision by ordinance for the number of deputies, their

qualifications and compensation by virtue of the constitution itself which can be read into the charter the same as if it had been made a part thereof by the framers of the charter themselves." We do not think the charter can be thus interpreted, for it is not to be assumed that it would have been adopted by the voters had the additional provision, required by the constitution, been included. To add this provision would be to create a new and different charter.

Petitioner's contention that he occupies a special office of deputy county clerk and recorder cannot be maintained. The charter does not create such an office, nor provide compensation therefor. It does fix the salary of the county clerk as county clerk and recorder, and does provide that "his chief deputy shall receive one thousand two hundred dollars per annum." It cannot be held that the charter by this provision has made petitioner's office a special one thereunder—one not within the mandate of the constitution. In providing the salary the charter only has reference to the office as a deputyship in the office of the county clerk. As such it is one of the positions contemplated by section 7½, article XI, of the constitution, for that provision concerns the appointment and regulation of deputies generally, and does not except chief deputies.

As pointed out, that section of the constitution requires that a charter adopted pursuant thereto *shall* provide for the fixing and regulation by ordinance of the board of supervisors of the manner of appointment or removal, the number, and the compensation of deputies. Petitioner's position being that of a deputyship in a county office, and such deputyship not being a special county office, it is to be governed by section 7½ of article XI of the constitution so far as the manner of appointment and compensation are concerned. Therefore, that portion of section 2 of article IV of the charter, prescribing the salary of the chief deputy, is inoperative, either as creating the office, prescribing the manner of appointment, or fixing the salary. Also, section 9 of article II of the charter, in so far as it denies to the board of supervisors the power to legislate concerning the offices of assistants and deputies, is not in conformity with section 7½ of article XI of the constitution, and is invalid. There is, therefore, no provision in the charter of Tehama County for the appointment and compensation of deputy county clerks.

It thus appears that the charter is not in conformity with the constitution, in this respect, inasmuch as it does not contain a provision which the constitution declares is essential. The question has been suggested whether this failure to observe the constitutional requirement does not render the charter entirely inoperative. In *Brooks v. Fischer*, 79 Cal. 173, 177, [4 L. R. A. 429, 21 Pac. 652] the court, in discussing the charter of the city of Los Angeles, said: "The further objection is, that the charter, if properly adopted, must be held to be invalid for the reason that it is in conflict with the general laws of the state.

"Under the provisions of the constitution, the charter to be framed for a city government must be 'consistent with and subject to the constitution and laws of this state.' It is contended by the petitioner that certain provisions of the charter are inconsistent with existing general laws, and particularly that it is in conflict with the general law with reference to the improvement of streets. It may be that certain of its provisions are inconsistent with present laws, and that so far it cannot be effective as against such laws, but this is a matter that it is unnecessary for us to determine. It is enough to say that the whole charter cannot be held to be invalid because of the fact that a few of its provisions may conflict with general statutes now in force." In *Winter v. De Shields* (Cal. App.), 189 Pac. 703, it was contended that the same charter of Tehama County under consideration in the case at bar was unconstitutional as a whole. Among the reasons assigned was that sections 5, 9, 10, and 11 of article II of the charter contravened subsections 4 and 5 of section 7½ of article XI of the constitution. The court, holding the charter as a whole to be valid, declared: "Without entering into an examination of the objections raised by the petitioner to the charter, it is sufficient to say that, even if these objections possessed merit, still, they would not render the whole charter of the county null and void and would have no bearing upon the question of the validity of the provision of the charter which fixes the salary of the assessor at the sum of two thousand dollars per annum.

[1] "The rule is well settled in California that, while a charter should be consistent with the constitution of the state, the whole charter cannot be declared null and void

because it may contain certain provisions that are inconsistent with the constitution of the state at the time of its adoption." [2] It follows that the charter does not become totally invalid because it failed to provide for the regulation of deputyships by the board of supervisors.

Respondent further states that "No provision having been made by the Tehama County charter for the payment of the salary of the deputy county clerk, it might be determined that he would be entitled to his salary under the provisions of section 4266 of the Political Code, which provides a salary of one thousand two hundred dollars per annum for a deputy county clerk." Section 7½ of article XI of the constitution provides that a charter upon its ratification by the legislature "shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided, . . . and shall supersede all laws inconsistent with such charter *relative to the matters provided in such charter*," and that "Whenever any county has framed and adopted a charter, . . . the general laws . . . shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, *and for which provision is made therein*, except as herein otherwise expressly provided." (Italics ours.) These provisions contemplate that there may be a case where a charter will fail to provide for matters which it properly should cover, and the intention is clear that in such a situation the general law, which in such a case has not been superseded by the charter, shall govern. (See *Cline v. Lewis*, 175 Cal. 315, 316, [165 Pac. 915].) [3] Such a situation is presented here, and it follows that the general law on the subject of petitioner's appointment and compensation has not been superseded, but remains effective. The provision of the general law which is applicable to Tehama County in the absence of a charter provision is contained in section 4266 of the Political Code, which reads in part as follows: "In counties of this class the county clerk may appoint a deputy, which office of deputy county clerk is hereby created, and said deputy shall receive as compensation for his services the sum of one thousand two hundred dollars per annum." Section 4024 of the Political Code provides: "Every county, township, or district officer, except a supervisor or judicial officer, may appoint as many

deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Such appointment must be made in writing, and filed in the office of the county clerk; and until such appointment is so made and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy." The petition in this case shows, as stated above, that the requirements of this section of the code have been complied with—that petitioner's appointment was in writing, that it was filed in the office of the county clerk, and that he has taken the oath of office. Consequently, he is entitled to receive his salary as deputy county clerk. However, he is to receive compensation under the provisions of section 4266 of the Political Code and not by virtue of the charter of Tehama County.

For the foregoing reasons it is ordered, adjudged, and decreed that a peremptory writ of mandate issue out of this court, directed to respondent auditor of Tehama County, commanding him to draw his warrant upon the treasurer of said county for the sum of one hundred dollars, in payment of petitioner's salary as chief deputy county clerk and recorder for the month of November, 1920.

Wilbur, J., Lennon, J., Sloane, J., and Shurtleff, J., concurred

Angellotti, C. J., concurred in the judgment.

SHAW, J., Concurring.—I concur in the judgment, but for reasons somewhat different from those set forth in the opinion of Mr. Justice Lawlor.

The petitioner was appointed deputy county clerk of the county of Tehama by the clerk thereof. In the instrument of appointment he was named as "chief deputy." The word "chief," however, should be considered immaterial in considering the validity of his appointment as a deputy county clerk, if, as is contended, there is no office specifically designated as "chief deputy county clerk." He prays for a writ of mandate to compel the auditor to issue a warrant for his salary at the rate of one hundred dollars a month for services rendered as such deputy county clerk, the auditor having refused on demand to issue such warrant.

Tehama County is operated under a special charter framed and adopted in pursuance of section 7½, article XI, of the



constitution. That section authorizes any county to frame a charter for its own government in the manner therein provided. It provides that when such charter is duly framed and approved by the legislature it "shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided . . . and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter."

Subdivision 4 of the portion thereof declaring what it shall be competent to insert in such charters is as follows: "For the powers and duties of the board of supervisors *and all other county officers*, for their removal and for the consolidation and segregation of county officers, and for the filling of all vacancies occurring therein; *provided*, that the provisions of such charter relating to the powers and duties of boards of supervisors *and all other county officers* shall be subject to and controlled by general laws."

This proviso is probably modified to some extent by a subsequent provision as follows: "Whenever any county has framed and adopted a charter, and the same shall have been approved by the legislature, as herein provided, the general laws adopted by the legislature in pursuance of sections four and five of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein, except as herein otherwise expressly provided."

Sections 4 and 5 of this article referred to in the last quotation are the sections which authorize the legislature to establish a system of county governments and to provide by law for the appointment of the several county officers named in said section 5 and to prescribe their duties and regulate their compensation.

It will be seen from these provisions of section 7½ that the powers and duties of county officers in any county adopting a special charter under that section remain subject to and controlled by general laws respecting anything relating thereto concerning which the charter makes no provision. If, therefore, we find no valid provision in the charter with respect to the appointment and compensation of deputy county clerks, it would follow that the provisions of the general law regarding them would prevail. The

charter contains certain provisions on that subject with respect to county clerks. It provides that there shall be a county clerk and that he "shall be *ex-officio recorder*." (Stats. 1917, p. 1883.) It further provides that his salary as clerk and recorder shall be two thousand four hundred dollars per annum and that "his chief deputy shall receive one thousand two hundred dollars per annum." (Art. IV, sec. 2, Stats. 1917, p. 1883.) It also provides in section 4 of article III that "each county officer shall have the powers and perform the duties now or hereafter prescribed by general law as to such officer, except as otherwise provided by this charter." Section 9, article II, of the charter, provides that "the supervisors shall appoint all county and district officers other than elective officers, their assistants and deputies, except as otherwise provided in this charter," and shall provide by ordinance for the terms of office and for the compensation of these appointive officers, "unless such terms of office are otherwise provided by law or by this charter." Inasmuch as the compensation of the chief deputy clerk was attempted to be provided for by the charter in article IV aforesaid, it follows that this last provision cannot be construed to authorize the supervisors to provide compensation for such chief deputy county clerk.

It is conceded by the parties hereto that the supervisors have never by ordinance or otherwise appointed or provided for the appointment of any deputies or fixed the compensation of any of them.

The provisions of section 7½ of article XI of the constitution above set forth, it is to be observed, do not authorize the legislature, or the county, by means of a freeholders' charter, to provide directly for the appointment of deputy county officers or for their compensation. On the contrary, that section prescribes in subdivision 5, as above shown, that the charter shall provide for the fixing and regulation by the board of supervisors by ordinance for such appointment and compensation. The matter is not to be fixed by the charter itself, but by ordinance adopted by the board of supervisors. It follows, therefore, that the charter contains no valid provision either for the appointment of the petitioner or other person as deputy county clerk, or for his compensation when appointed. Also, it follows from the fact that the charter contains no provision therefor, that

the provisions of the general law empowering the county clerk to appoint his own deputy and fixing the compensation of such deputy are not superseded by the charter, but remain in full force as if no charter had been adopted. The conclusion is therefore inevitable, since the general law allows the deputy county clerk a salary of one hundred dollars per month and since his appointment as chief deputy is in substance an appointment as deputy county clerk, that the petitioner is entitled to the salary demanded by him, and that the writ of mandate should issue as prayed for.

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[Sac. No. 3234. In Bank.—November 10, 1921.]

HENRY ARTHUR MARTIN, Petitioner, v. GEORGE M. DE SHIELDS, as Auditor, etc., Respondent.

[1] COUNTIES—COMPENSATION OF SHERIFF AND DEPUTIES—CHARTER OF TEHAMA COUNTY—CONSTITUTIONAL LAW.—The provision of the charter of the county of Tehama (Stats. 1917, p. 1883) that the salary of the sheriff as sheriff and coroner shall be two thousand four hundred dollars per annum, and he may be allowed deputies not to exceed one thousand three hundred dollars per annum, is not violative of section 7½ of article XI of the constitution, since the provision with reference to the salary of deputies is a part of the provision fixing the compensation of the sheriff, as authorized by subdivision 2 of the section.

APPLICATION for a Writ of Mandamus to compel a county auditor to draw a salary warrant. Granted.

The facts are stated in the opinion of the court.

F. L. Butterway for Petitioner.

M. J. Cheatham, District Attorney, for Respondent.

LAWLOR, J.—This is a companion case to *Jones v. De Shields*, ante, p. 331, [202 Pac. 137]. Petitioner, Henry Arthur Martin, was appointed by the sheriff of Tehama County to the position of deputy sheriff, but respondent, George M. De Shields, as auditor of said county, refused to draw his warrant on the county treasurer in the sum of

\$108.33 for petitioner's salary for the month of November, 1920. The contentions of the parties are the same as those made in *Jones v. De Shields, supra*.

[1] In section 1 of article IV of the charter of Tehama County (Stats. 1917, p. 1883) it is provided as follows: "The salary of the sheriff as sheriff and coroner shall be two thousand four hundred dollars per annum, and he may be allowed deputies at not to exceed one thousand three hundred dollars per annum." As was held in *Jones v. De Shields, supra*, an allowance to the chief deputy or other deputy as salary for the services of such deputy is violative of the constitutional provision which requires that the power to fix the number and compensation of deputies must be vested by the charter in the board of supervisors. The situation, however, presented by the provision of the charter relating to the salary of the sheriff is different. The provision with reference to the salary of deputies is a part of the provision fixing the compensation of the sheriff as authorized by subdivision 2 of section 7½ of article XI of the constitution. (See *Dougherty v. Austin*, 94 Cal. 601, [16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092].) It is as though the provision had read: "The compensation of the sheriff shall be two thousand four hundred dollars per annum and the pay of his necessary deputies to the extent of one thousand three hundred dollars per annum." If part of the provision must fall it is clear that all must fall, with the result that the charter would be without any valid provision at all as to the compensation of the sheriff. This would relegate the sheriff to his salary under the general law. (*Jones v. De Shields, supra*.) It is not necessary, however, to hold the entire provision invalid. It embodies a well-recognized method of fixing the compensation of an officer, as shown by *Dougherty v. Austin, supra*, and a long line of subsequent decisions, at either a lump sum, he to pay his own deputies and assistants, or at a specified sum, with an allowance for a part of the expenses of deputies and assistants. Here we have the second one of these alternative methods—a specified sum, together with further allowance for deputies to the extent of one thousand three hundred dollars per annum. If we assume that the sum of one thousand three hundred dollars allowed for deputies is an essential part of the compensation of the sheriff, and therefore the provision con-

cerning the same authorized by the provisions of section 7½, article XI, providing that the compensation of the sheriff may be fixed by the charter, then the sheriff undoubtedly had a right to appoint the petitioner as deputy sheriff under the general law at a salary to be fixed by the sheriff himself and to be paid from the compensation allowed by the charter to the sheriff, unless other provision is made in that behalf by the general law. The general law relating to Tehama County fixes the salary of the sheriff at four thousand eight hundred dollars, a lump sum, from which salary the sheriff is required to pay his deputies. The salary of two thousand four hundred dollars allowed by the charter, plus an allowance of one thousand three hundred dollars for deputies, takes the place of and supersedes the salary allowed by the general law to the sheriff. It may be assumed, we think, in the absence of any contention or showing to the contrary, that the sheriff in employing the petitioner fixed his salary at the sum of \$108.33 per month, and this sum so fixed by the sheriff is payable from the county treasury from that portion of the salary of the sheriff fixed by the charter to be paid to his deputies.

It is to be observed that we are not here considering a situation where the general law fixes the salaries of the sheriff's deputies in Tehama County. We are merely holding that the effect of the charter is to fix the compensation of the sheriff at three thousand seven hundred dollars per annum, one thousand three hundred dollars thereof to be used by the sheriff for compensation for such necessary deputies as he may appoint to assist him in the performance of his duties. The charter cannot be considered as a limitation upon the power of the legislature to give to the sheriff additional deputies, as such limitation has no place in the charter. (*Jones v. De Shields, supra.*) The charter having failed to authorize the supervisors to make provision for necessary deputies for the sheriff, that right remains in the state legislature. In the meantime, however, the sheriff is entitled to appoint deputies and pay their salaries to the extent of one thousand three hundred dollars from the fund set apart for that purpose to him by the charter.

The application for a writ of mandate is granted.

Wilbur, J., Angellotti, C. J., Shaw, J., and Shurtleff, J., concurred.

[Sac. No. 2892. In Bank.—November 12, 1921.]

STATE OF CALIFORNIA, etc., Appellant, v. THE  
ROYAL CONSOLIDATED MINING COMPANY (a  
Corporation), et al., Respondents.

- [1] **TAXATION—INVALID SALE TO STATE—CONTINUANCE OF LIEN—JUDGMENT.**—In an action by the state controller to recover the possession of real property which had been conveyed to the state for delinquent taxes, a judgment decreeing that the state had no interest in or lien upon the property because of the invalidity of the original tax sale to the state is erroneous, since the lien of the state remains as a burden on the property until discharge by payment or by a valid sale to the state.
- [2] **ID.—ACTION BY STATE—POSSESSION OF PROPERTY—AFFIRMATIVE RELIEF—RIGHT OF DEFENDANT.**—In an action by the state controller acting under the provisions of section 3773 of the Political Code to recover the possession and the rents and profits of real property which had been deeded to the state for delinquent taxes, the defendant cannot, in the absence of statutory authority, convert the action into one to quiet title and obtain affirmative relief therein against the state.
- [3] **ID.—CONSENT OF STATE—PROVISIONS AUTHORIZING CROSS-COMPLAINTS INSUFFICIENT.**—The provisions of the law authorizing cross-complaints do not give the consent of the state to a cross-complaint to quiet title in an action brought by the state controller, representing the state, for the possession and for an accounting of the rents and profits of real property deeded to the state for delinquent taxes.
- [4] **COURTS—ACTIONS CONCERNING POSSESSION OF REAL ESTATE—JURISDICTION—CONSTITUTIONAL LAW.**—Where the constitution itself has expressly defined and fixed the exclusive jurisdiction of its courts with reference to actions concerning the possession of real estate, the legislature cannot, under the general power to legislate, infringe upon the jurisdictional limits established by the constitution itself, by giving jurisdiction to superior courts of counties other than those in which the property is located.
- [5] **TAXATION—RECOVERY OF POSSESSION OF REAL PROPERTY—JURISDICTION—SECTION 3773, POLITICAL CODE, UNCONSTITUTIONAL.**—Section 3773 of the Political Code, in so far as it attempts to give jurisdiction to the superior court of Sacramento County of actions by the state controller for the possession of real property located in other counties which has been conveyed to the state for delinquent taxes, is void, in view of section 5 of article VI of the constitution, which gives exclusive jurisdiction of actions to quiet

title or for the possession of real property to the superior court of the county in which the property is situated.

[6] **ID.—RECOVERY OF RENTS—LOCAL CHARACTER OF ACTION NOT DESTROYED.**—The local character of an action on behalf of the state to recover the possession of real property which has been conveyed to it for delinquent taxes, is not affected by the fact that the action is also one for the rents, issues, and profits of the property, since the action in so far as it relates to the rents is essentially one to quiet title within the meaning of the constitution.

[7] **PLEADING—ACTION FOR RENTS—ISSUE OF TITLE—CHARACTER OF ACTION.**—An action for rents and profits of real property where the right to the title is involved is not a transitory action.

**APPEAL** from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge. Reversed.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, Charles P. Snyder, District Attorney, W. A. Gett and Downey & Downey for Appellant.

Alfred J. Harwood for Respondents.

**WILBUR, J.**—This action is brought by the controller of the state of California, acting under and by virtue of authority conferred upon him by section 3773 of the Political Code, to secure the possession of, and the rents, issues, and profits derived from, certain mining properties described in the complaint. Plaintiff alleges that the state of California ever since July 12, 1910, has been the owner of the real property described in the complaint, "being the same land conveyed by Louis Cadematori, Tax Collector of Calaveras County, State of California, to the State of California, on the 12th day of July, 1910," The defendants deny that the state of California was the owner of said properties on the twelfth day of July, 1910, or of any part thereof, and deny that the state of California is the owner of said real property or any part thereof. They deny that the land or any part thereof was conveyed by Louis Cadematori, tax collector, to the state of California on July 12, 1910, or at any other time. Defendants further aver that the Royal Calaveras Mining Company is the owner in fee simple absolute of the property in question. Defendants pray judg-



ment that plaintiff take nothing by the action, and that defendants have judgment for their costs of suit. The court found that the state of California was not the owner of the property and stated its conclusions of law, as follows:

"I. That the plaintiff is not the owner of the real property described in the complaint, or any part or portion thereof, and that plaintiff has no right, title or interest in said real property.

"II. That the defendant Royal Calaveras Mining Company, a corporation, is the owner and seized in fee thereof, and is in possession and is entitled to the possession of the same and the whole thereof.

"III. That defendants are entitled to judgment and to their costs of suit."

In the judgment it is ordered, adjudged and decreed "that the plaintiff is not the owner of the real property described in the complaint or any part or portion thereof *and that plaintiff has no right, title or interest in said real property.* . . . That defendant Royal Calaveras Mining Company is the owner and seized in fee of said real property described in the complaint and is in possession and is entitled to the possession of the same and the whole thereof." Then follows the judgment for costs.

The adjudication is, in effect, a judgment quieting the title of the defendant to the property in question against all claims of the state of California of every nature and description.

[1] The judgment here is particularly objectionable by reason of the fact that under our system of taxation the liens for taxes imposed for the five years immediately succeeding the sale and prior to the execution of the deed do not result in a sale and remain liens on the property until payment or a valid sale from the state of California. For the years subsequent to the deed to the state the property is not assessed at all on the theory that the property then belongs to the state, but if the deed to the state is void, the inchoate lien of the state for the taxes of succeeding years remains as a burden upon the property until discharged, and therefore a judgment against the state decreeing that the state has no interest in or lien upon the property in question because of defects in or the invalidity of the *original tax sale* to the state in 1905 is erroneous.

It is well settled that such relief will be denied to a property owner notwithstanding errors in the sale or in the assessment, if it can be ascertained from the assessment that the property owner is liable in justice and good morals to pay a tax thereon which has not been paid. (*Savings & Loan Society v. Burke*, 151 Cal. 616, [91 Pac. 504].) Under our system of taxation the lien therefor attaches on the first Monday in March of each year. "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." (Pol. Code, sec. 3716.) Taxes upon personal property and upon the improvements upon real property are also liens upon the real property. (Pol. Code, secs. 3717 and 3719.) The lien attaches and remains upon the real estate until payment or sale, notwithstanding defects in the assessment, and if the sale is for any reason void, it, of course, does not discharge the lien. If the judgment in this case had been confined to the right of possession of the plaintiff, which depends upon the validity of the tax sale relied upon, the court could have entered such a judgment without requiring the defendant to pay the taxes upon the property. But where, as here, the judgment goes further, and awards affirmative relief to the defendants, it is clearly erroneous and must be reversed.

[2] The court by its judgment in effect treated the answer as a cross-complaint to quiet title and quieted the title of the defendant against all claims of the state of California. Although such relief was not expressly prayed for by the defendant. The state controller, under the provisions of section 3773 of the Political Code, represents the state for the purposes of requiring an accounting for rents and profits and securing possession of the real property, but he had no authority to represent the state as a defendant in a suit to quiet title, nor had the state authorized itself to be sued in an action to quiet title to determine the validity of liens for taxes or tax deeds issued to it. The defendant, of course, could resist the claims of the state controller made for possession and for an accounting of rents and profits on behalf of the state by any appropriate defense, including the defense of the invalidity of the tax deed (36 Cyc. 910, sec. 7a),

but it could not convert the action brought by the state controller into one against the state for affirmative relief by an application for affirmative relief. The claim against the state could not be maintained in the absence of statutory authority (*People v. Talmage*, 6 Cal. 256; *People v. Miles*, 56 Cal. 401; *People v. Lee Chuck*, 74 Cal. 32, [15 Pac. 322]), either by complaint or by cross-complaint.

The rule is thus stated in 36 Cyc. 910: "As a part of his defense defendant may maintain against the state a cross-bill or cross-complaint, provided it relates only to the subject matter of plaintiff's suit and does not pray for original and independent relief; but he cannot maintain such cross-action for independent affirmative relief; nor can he, without clear statutory authority therefor, claim the benefit of a setoff or counterclaim against the state constituting an independent cause of action, for this would contravene the rule that a state cannot be sued without its consent, although there is some authority to the contrary" (citing *People v. Miles*, *supra*).

[3] The general provisions of the law authorizing cross-complaints do not give the consent of the state to such cross-complaint in an action brought by the state (*People v. Miles*, *supra*).

For the reasons above given it will be necessary to reverse the judgment in this case. If the case were to go back for a new trial, it would be proper for us to consider the various points raised as to the validity of the tax deed upon which the plaintiff relies; but we were in doubt as to whether or not the superior court of the county of Sacramento had jurisdiction of this action, notwithstanding the express provisions of section 3773 of the Political Code purporting to grant such jurisdiction. The question is as to the jurisdiction of the superior court under the constitution itself (art. VI, sec. 5). By this section of the constitution the superior court of the county in which the land is located is given exclusive jurisdiction of actions to quiet title to or for the possession of such real estate. As this action is clearly one for the possession of real estate, and as the question had not been presented by counsel, we called for argument as to the constitutionality of section 3773 of the Political Code, which expressly confers jurisdiction upon the superior court of Sacramento County, regardless of the location of the land.

The attorney-general claims that the superior court of Sacramento County has jurisdiction under the provisions of section 3773 of the Political Code, and that that section is constitutional for the reason that the state is not bound by the general words of the constitution or statute unless expressly declared so to be, and hence is not bound in actions instituted by it to begin a suit in the superior court of the county where the land is located. He relies upon the rule declared and applied in *Mayrhofer v. Board of Education*, 89 Cal. 110, [23 Am. St. Rep. 451, 26 Pac. 646]; *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 240, 241, [90 Pac. 936]; *City Street Imp. Co. v. Regents*, 153 Cal. 776, 778, 780, [18 L. R. A. (N. S.) 451, 96 Pac. 801]; *Clark v. Los Angeles*, 160 Cal. 30, 39, 41, [116 Pac. 722]; *Miller v. Pillsbury*, 164 Cal. 199, 201, 202, 204, 205, [Ann. Cas. 1914B, 886, 128 Pac. 327]; *Witter v. Mission School Dist.*, 121 Cal. 350, 351, [66 Am. St. Rep. 33, 53 Pac. 905]. We have had occasion recently to consider the rule with reference to the applicability of laws of general nature to the state and its subdivisions, and a reference to those cases will be sufficient to show the general rule on the subject. (See *Balthasar v. Pacific Elec. Ry. Co.*, ante, p. 302, [202 Pac. 37].)

These cases, however, have no applicability to the facts in this case. The people of the state in forming its government divided its sovereign powers into separate departments—the judicial, the legislative, and the executive (art. III, sec. 1, Const.). The people vested directly in the superior court of a county the exclusive jurisdiction to determine controversies over the possession of land and to quiet title thereto (Const., art. VI, sec. 5). If the people by the constitution had simply directed the legislature, with reference to the establishment of jurisdiction of the several superior courts of the state, to give such exclusive jurisdiction, it might be contended with some force that the general direction to the legislature to vest jurisdiction over cases of certain types to certain superior courts did not apply to actions begun by the state itself. The situation, however, is altogether different. [4] Where the constitution itself has expressly defined and fixed the exclusive jurisdiction of its courts with reference to actions concerning the possession of real estate, the legislature cannot under its general power to legislate infringe upon the jurisdictional limits established

by the constitution itself, by giving jurisdiction to the superior courts of Sacramento County which the constitution confers upon the superior court of Calaveras County exclusively. In interpreting the constitutional provisions concerning the organization and jurisdiction of courts we are dealing with the sovereign powers of the state and vesting such sovereign powers in certain departments, hence there is no room for the application of the rule that the state is not affected in the exercise of its sovereign powers by the general language of statute or constitution applicable to private citizens and alone apparently applicable to the state because of the comprehensive character of the terms used. Here the constitution is expressly dealing with such sovereign powers. We are dealing as much with the sovereign power of the state in determining the limitation of the jurisdiction of the courts as we are in determining where the legislative power of the state is to be vested. The superior court of a county in exercising its jurisdiction is exercising the sovereign power of the state. Where the limitations of that power are fixed by the constitution, the mere fact that the state legislature has all the sovereign powers of legislation, except where restricted by the constitution, does not authorize the legislature by statute to vest jurisdiction in opposition to the express terms of the constitution itself.

It may be conceded, as contended by the attorney-general, that where the government in the exercise of its sovereign power is attempting to use the process of court for the collection of taxes essential to its existence, such actions stand on an altogether different basis from the ordinary actions between citizens. It is recognized in *People v. Central Pac. R. R. Co.*, 105 Cal. 576, 588, [38 Pac. 905]; that special provisions as to procedure may be made by the legislature in such cases. This concession, however, does not meet the situation with which we are confronted. The people by their constitution have expressly limited the powers of the superior courts of the state so that no superior court has any right to try actions for the possession of real estate or the quieting title thereto, except such actions as involve real estate within the boundaries of the county, except upon transfer from the superior court of such county. If the legislature in the exercise of its taxing power desires to avail itself of the courts for the purpose of the collection

of taxes, it must act in accordance with the constitutional limitations placed upon the courts. [5] We conclude from the foregoing that the statute in so far as it attempts to give jurisdiction to the superior court of Sacramento of actions for the possession of real estate located in other counties is unconstitutional and void.

[6] The attorney-general also contends that as the complaint not only prayed for the possession of the land, but also for the rents, issues, and profits thereof theretofore accrued and for a receiver, that the action is thus one for both personal relief as well as for possession of land, and hence the constitutional provision does not give exclusive jurisdiction over such an action to the superior court of the county in which the court is located. Upon this proposition the attorney-general relies upon *Le Breton v. Superior Court*, 66 Cal. 27, 30, [4 Pac. 777]; *Wood v. Thompson*, 5 Cal. App. 247, 248, [90 Pac. 38]; and also upon cases interpreting section 392 of the Code of Civil Procedure, as to the jurisdiction of superior courts, such as *Smith v. Smith*, 88 Cal. 572, [26 Pac. 356]; *Nason v. Feldhusen*, 34 Cal. App. 789, 795, [168 Pac. 1162]; *Weyer v. Weyer*, 40 Cal. App. 765, [182 Pac. 776]; *Warner v. Warner*, 100 Cal. 11, [34 Pac. 523]; *Clark v. Brown*, 83 Cal. 181, [23 Pac. 289]; *Peninsular Trading etc. Co. v. Pacific Steam W. Co.*, 123 Cal., 689, 696, [56 Pac. 604]. On this point it is sufficient to say that the action in so far as it relates to rents, issues, and profits is essentially one to quiet title within the meaning of the constitution, because the right thereto depends upon the issue of title and an adjudication of the right to rents is necessarily determinative of the right to the land itself. This principle was laid down in *Fritts v. Camp*, 94 Cal. 393, [29 Pac. 867]. In that case the plaintiff owning land in Siskiyou County brought suit in Del Norte County to enjoin the defendant from depositing mining debris in Indian Creek to the injury of plaintiff's land in Siskiyou County. The complaint alleged that the defendant claimed adversely an easement so to do. The plaintiff disputed the claim and the court found that there was no easement. The court held that by reason of these issues the exclusive jurisdiction of the case was in Siskiyou County. In the case at bar plaintiff's claim to the rents, issues, and profits of the land is based upon a claim of title thereto, and the defendant re-



sists on the ground that it has title. The court on this issue finds that the defendant has title and that the plaintiff has no title, and bases its judgment upon this finding. The case of *O'Meara v. Hables*, 163 Cal. 240, [134 Pac. 1003], is not opposed to this view; that was a suit by a landlord for rents reserved in a lease and it was held that neither the possession of or right of possession to the land was a material issue in the case.

[7] The action for rents and profits of land where the right to the title is involved is not a transitory action. The distinction between local and transitory actions is thus stated in 40 Cyc. 59, 63: "The action must be brought where the land lies if these two things concur: (1) If the subject of inquiry is a right or interest in the land; and (2) if the judgment in the case will operate directly upon this right or interest." (40 Cyc. 59.)

"When the determination of an estate or interest in land is not an incident in the determination of a cause for equitable relief in trust, fraud, or contract, but is itself the immediate question before the court, and may come within the immediate effect of its decree operating *ex proprio vigore*, then the venue is local. The real question in all these cases is as to the true nature of the action: Does it turn on the personal obligation or on the title? Does it take immediate effect *in personam* or upon the interest in the land? And the test here is found, not in any formal characteristic, but in the substantial nature of the action as shown in the pleading, and the kind of judgment which may be rendered." (40 Cyc. 63.)

It is clear that the demand for rents, issues, and profits of the land in this case does not destroy the local character of the action for possession of the land, and that this case does not come within the purview of cases holding that where a transitory cause of action is properly joined with a local one, the local court does not have exclusive jurisdiction.

It must be concluded that section 3773 of the Political Code, in so far as it authorizes an action to be brought in Sacramento County for either the possession of lands or for the rents, issues, and profits thereof because of a tax deed to the state, where such lands are in other counties, is void, as a violation of the jurisdiction vested by the constitu-



tion in the superior courts of the respective counties in which the land is located.

It is contended that this action is essentially one "involving the legality of a tax" (art. VI, sec. 5), and hence triable in any county, but if it be conceded to be such an action, it is also one for the possession of real estate and comes within the proviso in article VI, section 5, vesting exclusive jurisdiction in the superior court of the county in which the land is located.

The judgment is reversed and the trial court directed to dismiss the case without prejudice to the rights of the state to renew the action in Calaveras County.

Sloane, J., Shaw, J., and Lennon, J., concurred.

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[L. A. No. 6233. In Bank.—November 12, 1921.]

IMPERIAL VALLEY LAND COMPANY (a Corporation),  
Appellant, v. GLOBE GRAIN & MILLING COMPANY  
(a Corporation), et al., Respondents.

- [1] LANDLORD AND TENANT—LEASE—RENT PAYABLE IN COTTON—RIGHTS OF LANDLORD.—An agreement to raise cotton on leased land and deliver to the landlord one-fourth of the crop as rental creates no title in the landlord to such portion, but merely measures in cotton the amount of the rental for which the tenants are liable.
- [2] CONVERSION—PLEADING—INSUFFICIENT ALLEGATION OF OWNERSHIP. In an action by a landlord against a bank for the alleged conversion of certain cotton claimed by the plaintiff as rental for the premises upon which the cotton was grown, the recital in the complaint that the defendant held warehouse receipts for the cotton issued to one of the tenants and delivered to the bank as security for an indebtedness, and that the bank unlawfully sold and appropriated the proceeds of such cotton, was not a sufficient allegation of ownership, nor can it be so construed on appeal to reverse the judgment in favor of the defendant where the recital was directly contrary to the direct and specific allegations of the complaint.
- [3] APPEAL—QUESTION NOT RAISED IN LOWER COURT.—A question not raised in the lower court cannot be determined on appeal.

[4] *Id.*—FINDINGS OUTSIDE OF ISSUES.—Findings outside of the issues raised by the pleadings and those actually submitted to and tried by the court should be disregarded.

[5] *Id.*—JUDGMENTS—PRESUMPTION.—On appeal, presumptions are indulged in favor of judgments.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge. Affirmed.

The facts are stated in the opinion of the court.

Sloss, Ackerman & Bradley, Lloyd S. Ackerman and Jas. W. Glassford for Appellant.

J. Stewart Ross, R. B. Whitelaw and Hickcox, Crenshaw & Trude for Respondents.

WILBUR, J.—This is an action to recover \$8,470.37 damages for the conversion of ninety-four bales of cotton. The plaintiff secured judgment against the defendants R. G. Erskine and C. Curtis for this amount sued for, less a payment of \$1,499.80 made after the complaint was filed, but the judgment was in favor of the other defendants, Globe Grain and Milling Company, California Food Products Company, First National Bank of Calexico, and First National Bank of Los Angeles. Plaintiff appeals from that portion of the judgment in favor of the defendants upon the judgment-roll containing a bill of exceptions in which the only specification of error is that the findings do not support the conclusions of law or the judgment. In appellant's briefs, however, the only portion of the judgment complained of is that in favor of the First National Bank of Los Angeles. Before stating the points relied upon by the parties some additional facts should be stated.

Plaintiff leased one thousand acres of land in Lower California, Mexico, to defendants R. G. Erskine and C. Curtis. The lessees were to raise cotton upon the land, and upon harvesting and ginning the same, agreed to render and deliver to the plaintiff one-fourth of the crop as rental. The cotton crop so raised amounted to 378 bales, ninety-four bales of which plaintiff claims that defendants wrongfully converted to their own use. It is evident that plaintiff's rights must turn upon the question of whether or

not it had title to or a lien upon this ninety-four bales of cotton. [1] The respondent claims that the ninety-four bales of cotton merely measured in cotton the amount of the rental to be paid by the tenants to the landlord, for which indebtedness they are liable, but this agreement created no title in the landlord to the cotton grown upon the land. This position is correct and is conceded to be so by the appellant. (*Clarke v. Cobb*, 121 Cal. 595, [54 Pac. 74]; *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, [68 Pac. 708].)

[2] The complaint does not state a cause of action against the First National Bank of Los Angeles, for the reason that it fails to allege that plaintiff owned the ninety-four bales of cotton alleged to have been converted by the bank. This point is made for the first time in respondents' final brief, filed after argument. A summary of the allegations of the complaint upon that subject follows.

It is alleged that the cotton crop grown upon the leased land was delivered to the compress-yard in Calexico, California, by C. Curtis, one of the tenants; that warehouse receipts were taken by him and pledged to the First National Bank of Los Angeles. It is alleged: "That all of said warehouse receipts including the warehouse receipts for the one-fourth ( $\frac{1}{4}$ ) of said cotton owned by the plaintiff herein, the title to which one-fourth ( $\frac{1}{4}$ ) interest was transferred to the plaintiff herein by the said Erskine and Curtis as payment for rent of the said premises hereinbefore described, and that all of said warehouse receipts are now being held by the said defendant, First National Bank of Los Angeles, or by its agent, the First National Bank of Calexico, and held by them in escrow to satisfy a purported bill of sale and a chattel mortgage, said bill of sale and mortgage heretofore made and delivered by said Erskine and Curtis to the defendant California Food Products Company." This parenthetical recital cannot take the place of a direct allegation of ownership, nor can it be so construed on appeal to reverse the judgment where the recital is directly contrary to the direct and specific allegations of the complaint. In that regard it is expressly alleged that, under the lease, Erskine and Curtis, the tenants, were to yield and pay as rental one-fourth of the cotton grown on the premises and that the defendants have, notwithstanding

demand therefor, *failed, neglected, and refused to deliver said one-fourth of said cotton or any part thereof* to the plaintiff, and that 378 bales of cotton were grown upon said premises, "of which under the terms of the aforesaid lease the plaintiff is entitled to and *should receive* free of all charges to the plaintiff at the compress-yard in the City of Calexico ninety-four (94) bales; that the defendants herein unlawfully and in violation of the rights of the plaintiff converted to their own use the said ninety-four (94) bales of cotton and sold the same, realizing therefrom the sum of eight thousand four hundred and seventy and 37/100 dollars (\$8,470.37)," and further alleged that, though often requested, "the defendants, and each of them, have failed, neglected, and *refused to pay to the plaintiff*, the value of the share of the plaintiff of the cotton grown on said premises amounting to the sum of eight thousand four hundred seventy and 37/100 dollars (\$8,470.37)" (italics ours). The complaint is framed upon the theory that the tenants failed to deliver the cotton to the plaintiff as they had agreed to do and that the subsequent sale and appropriation of the proceeds was a conversion of the property. Under these allegations no cause of action is stated against the First National Bank of Los Angeles, because it is affirmatively alleged that it was holding warehouse receipts issued to one of the tenants entitled to its possession and delivered to the First National Bank as security for an indebtedness owing to the bank, and this the bank had a right to do. The only cause of action stated is against Erskine and Curtis for unpaid rent.

We will not dispose of the appeal wholly upon the ground that the complaint does not state a cause of action against the First National Bank of Los Angeles, because this point was not raised by respondent until its final brief, and no reply was filed thereto. However, the sufficiency of the complaint is involved in the points presented which we will now consider. For that purpose we will state additional facts.

The defendants answered the complaint, after a general demurrer interposed by the Globe Grain & Milling Company was overruled. The answer contained a denial of the allegations of the plaintiff relating to the lease and cotton crop. Among other things, it was denied that the cotton

evidenced by the warehouse receipts was grown upon plaintiff's land or that plaintiff had any interest in or to the ninety-four bales of cotton. Affirmative allegations were made in the answer, to which we will presently refer, which, being quoted in the findings, have given rise to a misunderstanding as to the meaning and intent of the findings leading to a reversal of the judgment in favor of the bank by the district court of appeal, which court directed a judgment against the First National Bank of Los Angeles for the full amount claimed. Respondent claimed that this reversal was due to a misunderstanding of the record and, upon its petition, the case was transferred to this court for decision. It has since been argued and briefs filed by the parties, in addition to the petition for transfer and the answer thereto.

The district court of appeal reversed the judgment in favor of the First National Bank and ordered judgment against it upon the ground that the findings showed that the bank's claim had been fully paid and there remained in its hand sufficient of the proceeds of the cotton crop grown upon the land to pay the indebtedness due to the plaintiff. We will, therefore, first address ourselves to a consideration of that question.

The defendants' answer, after a denial of the allegations of the complaint, affirmatively alleges the facts concerning the pledging of the cotton by Erskine and Curtis to the First National Bank of Los Angeles. It alleges the loaning of money by the California Food Products Company to defendant Curtis upon the security of certain cotton, and that this company also advanced money to R. G. Erskine & Company upon a chattel mortgage and bill of sale of cotton grown on other lands farmed by them, with a guaranty of such indebtedness by C. Curtis. That these obligations and securities were all transferred to the bank, and were all paid, and thereafter the First National Bank of Los Angeles advanced twenty-one thousand dollars to Erskine and Curtis, for which Curtis executed and delivered the collateral notes of Erskine and Curtis, and did pledge to and deposit with the First National Bank of Los Angeles cotton represented by negotiable compress receipts as collateral security for the payment of the new liability created by said note, and that at the same time and under the

same conditions and with the same understanding the defendant bank advanced nine thousand dollars to R. G. Erskine & Company, and further alleges that "all of which said sums have since been paid by said C. Curtis."

The findings of the court follow word for word the affirmative allegations of the answer with reference to the twenty-one thousand dollar and the nine thousand dollar loans, and recites, in the language of the answer, "all of which said sums have since been paid by said C. Curtis." From this answer it appeared that the defendants were contending not only that the cotton had been hypothecated to the bank by C. Curtis for an indebtedness, but also admitting that said indebtedness had been fully paid. The answer does not state what became of the cotton, but it does deny any conversion of any interest of the plaintiff therein and denies that plaintiff had any interest therein. The findings, in addition to covering and conforming to the affirmative allegations of the answer, contain the following statement concerning the disposition of the cotton not made an issue by either the complaint or the answer.

"6. The crop of cotton raised by the defendants Erskine and Curtis on the land of plaintiff under the aforesaid lease between said defendants and plaintiff was sold as aforesaid and the proceeds thereof paid on the indebtedness of Erskine and Curtis to the First National Bank of Los Angeles, leaving an excess, the amount of which was the sum of ten thousand four hundred thirty-four and 58/100 Dollars (\$10,434.58); that the rent due plaintiff under its lease with the defendants Erskine and Curtis was the sum of eight thousand four hundred seventy and 37/100 dollars (\$8,470.37), of which amount one thousand four hundred ninety-nine (\$1,499.00) dollars was paid by the defendants Erskine and Curtis, after all indebtedness to said First National Bank of Los Angeles was satisfied, leaving unpaid and due from the defendants Erskine and Curtis to plaintiff the sum of six thousand nine hundred seventy-one and 37/100 dollars (\$6,971.37)."

From this condition of the record and findings the court of appeal deduced the following conclusion: "Neither the findings nor the evidence give any justification for the retention of plaintiff's money by the First National Bank of Los Angeles, and, in view of the findings of the trial

court that the indebtedness of Erskine and Curtis and of R. G. Erskine & Company was all paid to the bank and that the bank received from the proceeds of the sale of this property an excess over such indebtedness amounting to over ten thousand dollars, it is fair to assume that the bank still held that sum at the time of the trial, or that, in the absence of any reason for its failure to pay to plaintiff the amount due, any disposition which the bank made of the excess was illegal."

Thus the district court of appeal reached the conclusion that the bank had in its hands ten thousand dollars belonging to Erskine and Curtis after the payment of all indebtedness due to it by them. We mention this because it now seems to be conceded by both parties that the real situation with reference to the ten thousand dollars is this: That while it is true there was a surplus of ten thousand dollars received from the cotton crop raised upon plaintiff's land, over and above the indebtedness of Erskine and Curtis to the First National Bank, that this balance, with the exception of \$1,499 paid to the plaintiff, was applied by the bank to the indebtedness owing by R. G. Erskine & Company and guaranteed by C. Curtis, and that it was the application of this amount that paid the nine thousand dollar indebtedness of R. G. Erskine & Company, guaranteed by Curtis. In other words, the bank, instead of having ten thousand dollars over and above all indebtedness due it, had only \$1,499, which has already been applied to the plaintiff's claim. Viewed in the light of this admission, a critical analysis of finding 6, above quoted, reveals that the finding is not inconsistent with the facts as now admitted. That finding was evidently for the purpose of fixing the liability of the defendants Erskine and Curtis and not of the bank.

Before considering the other contentions of the parties, it is proper to say that the district court of appeal was no doubt misled as to the facts by the statements and admissions in the briefs of the parties, and, in view of the situation now developed, it is proper to call attention to some of the statements in those briefs. In appellant's opening brief, after reciting the advancement of the twenty-one thousand dollars and the nine thousand dollars, it is said: "These loans were made on the additional security of a



personal guaranty by C. Curtis, one of the tenants to whom appellant leased, *and subsequently C. Curtis paid all of said notes and advances.* Appellant's position at the trial was and now is that *after Erskine & Curtis' debts had been paid there was a surplus of \$10,434.58* out of which appellant was entitled to its rental or crop share, the value of which was \$8,470.37; that of this amount \$1,499 was paid and the respondent First National Bank of Los Angeles became and was indebted to appellant in the sum of \$6,971.37" (italics ours). It was further stated by appellant that there was no dispute on the facts, most of the evidence having been by way of stipulation and there having been no rebuttal by the defendants at the trial. Upon this statement the court was hardly to be expected to note that nine thousand dollars of the \$10,434.58 was applied to Curtis' pledge and that it was in this manner only that he paid "all of said notes and advances." The impression gained from this statement is that C. Curtis, from his own resources, had paid the amount of the loan made to him and to his principal, and that there still remained the amount of \$10,434.58 in the bank's possession. Respondent did not clear up this uncertainty in his reply brief, but, on the contrary, stated: "Respondents have only one issue with appellant in the statement of facts: There is no evidence nor finding of any partnership of Curtis and Erskine, nor of R. G. Erskine and Co." Thus, the respondent apparently conceded that the defendant had in its possession ten thousand dollars belonging to Erskine and Curtis, which the plaintiff was justly entitled to apply to the indebtedness due it from Curtis and Erskine.

The contentions of the parties in this court are therefore directed mainly to the question as to whether or not it was proper for the bank to apply the balance of the money received from the cotton grown on plaintiff's land to the indebtedness of R. G. Erskine & Company guaranteed by C. Curtis, when authorized so to do by C. Curtis. In short, the question raised here is as to the authority of Curtis to pledge the interest of Erskine, as copartner or cotenant, in the cotton grown upon plaintiff's land. [3] This question, which the appellant now seeks to have us determine, was not raised in the lower court and cannot be determined upon this appeal. The allegation of the plaintiff with

reference to the lease was merely by way of deraigning title to the cotton it claimed had been converted and showing that its claim for rent was unpaid. As already stated, it did not state a cause of action either for conversion or for rent against the defendant bank. A denial of these allegations by the defendant bank raised no material issue. The affirmative allegations of the answer were entirely unnecessary and offered no material issue. The apparent purpose of the respondent bank in the answer was to show good faith in that it had derived nothing from the sale of the cotton over the amount of its indebtedness. Later, a small excess of \$1,499 was turned over to plaintiff. It is evident from the record in the trial court that the respondent bank never had its attention directed to the contention now made by the appellant. Its admission in its answer and by a stipulation and the finding based thereon prepared by the defendant clearly indicates that its attention was never directed in that court to the contention made here by appellant.

Not only was there no issue upon the question as to the application of the balance due Erskine and Curtis to the guaranty of Curtis on the R. G. Erskine & Company indebtedness, but the plaintiff objected to testimony along that line. The objection is as follows: "Here plaintiff objected to any testimony regarding any negotiations between Clifton Curtis and the First National Bank of Los Angeles and R. G. Erskine & Co., upon the ground that plaintiff is not concerned with any negotiations had between those parties and upon the ground that said negotiations are incompetent, irrelevant, and immaterial and not within the issues made by the complaint, and upon the further ground that the only subject in controversy is whether or not the Imperial Valley Land Company is entitled to *one-fourth of defendant's share of the cotton crop grown upon their land*, which objection was overruled by the court and to which ruling plaintiff now excepts" (italics ours). Although the objection was overruled, no evidence was offered with reference thereto other than the stipulation of facts literally conforming to the affirmative allegations of the answer subsequently quoted in the findings of fact by the court referred to above, and so far as the record shows, apart from the admissions of the parties in their briefs in this court, it is

a matter of doubt as to whether the balance of nine thousand dollars was paid upon the R. G. Erskine & Company's indebtedness. It cannot, therefore, be said that the right of Curtis to pledge the assets of his copartner or cotenant Erskine was either raised in the pleadings or by consent tried as an issue in the case. [4] That the findings, so far as they tend to support a judgment in favor of the plaintiff against the defendant, First National Bank of Los Angeles, are outside of the issues raised by the pleadings and those actually submitted to and tried by the court, and, therefore, should be disregarded.

[5] On appeal, presumptions are indulged in favor of judgments, and not against them, but, if we assume that the issue of title to the ninety-four bales of cotton was in fact submitted to and decided by the trial court, its decision was against plaintiff on that issue. The respondent bank has contended throughout the progress of the case in the trial court and on appeal that plaintiff had failed to show any title to the cotton and hence could not recover damages for its conversion. In view of our conclusions, it is unnecessary to consider the effect of the negotiability of the warehouse receipts.

Judgment affirmed.

Sloane, J., Lennon, J., Shurtleff, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred.

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[Crim. No. 2348. In Bank.—November 12, 1921.]

THE PEOPLE, Respondent, v. N. STEELIK, Appellant.

[1] CRIMINAL LAW—SYNDICALISM ACT—INCLUSION OF ACCOMPLICES—LACK OF UNCERTAINTY.—The Criminal Syndicalism Act (Stats. 1919, p. 281) is not void for uncertainty because it *ex industria* includes accomplices and defines with meticulous care numerous acts constituting an aiding and abetting of the principal crime, or because it punishes aiders and abettors where the crime advocated is not committed.

[2] ID.—INDICTMENT—CHARGE OF SEVERAL OFFENSES—EVIDENCE—PROOF OF SPECIFIC OFFENSE—VALIDITY OF JUDGMENT.—An indict-

ment for the crime of criminal syndicalism is sufficient to support the judgment of conviction, notwithstanding it charges in general terms acts and offenses not proven, where it specifically charges the offense proven, and no other offense or acts were proven or offered to be proven.

- [3] **ID.—MEMBERSHIP IN INDUSTRIAL WORKERS OF WORLD—SUFFICIENCY OF INDICTMENT.**—An indictment charging a defendant with being a member of an organization known and designated as the Industrial Workers of the World sufficiently charges an offense under subdivision 4 of section 2 of the Criminal Syndicalism Act of 1919.
- [4] **ID.—ACTS DENOUNCED BY STATUTE—CONSTITUTIONAL LAW.**—The Criminal Syndicalism Act is not unconstitutional on the ground that it leaves to a court or jury the determination of whether or not the particular act or conduct of the defendant is adapted to the result denounced by the act, since the various acts mentioned in the statute are already denounced as wrongful under existing laws.
- [5] **ID.—GUARANTY OF FREE SPEECH—RIGHT NOT VIOLATED.**—The Criminal Syndicalism Act does not violate the right of free speech guaranteed in the federal and state constitutions.
- [6] **ID.—RIGHT TO ATTACK CONSTITUTIONALITY OF ACT.**—A defendant not charged with or convicted of a violation of the Criminal Syndicalism Act involving anything that he said or published is not in a position to attack the constitutionality of the act on the ground that it is violative of the right of free speech.
- [7] **ID.—TREASON PROVISIONS OF CONSTITUTIONS—ACTS INIMICAL TO PUBLIC WELFARE—PUNISHMENT NOT PROHIBITED.**—The definitions of treason contained in the federal and state constitutions are merely for the purpose of limiting the number of offenses which can be punishable as treason under the common law, and in no wise limits the power of the legislature to provide for the punishment of acts inimical to the public welfare which theretofore might have been punished as constructive treason.
- [8] **ID.—MEMBERSHIP OF UNLAWFUL ORGANIZATION—EVIDENCE—CONDUCT OF MEMBERS PRIOR AND SUBSEQUENT TO ENACTMENT.**—In a prosecution under the Criminal Syndicalism Act for being a member of an organization which in its nature is a criminal conspiracy to change industrial control and government by unlawful and criminal methods, evidence of the conduct of the members of the organization both before and after the passage of the act is admissible for the purpose of determining the character of the organization, where such organization after the passage of the act continued the publication of the same unlawful propaganda.
- [9] **ID.—MISCONDUCT OF COUNSEL—APPEAL—TIMELY OBJECTION.**—Misconduct of counsel in argument to the jury must be made at the time as a basis for complaint in the appellate court.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank R. Willis, Judge. Affirmed.

The facts are stated in the opinion of the court.

S. G. Pandit, J. H. Ryckman and Clore Warne for Appellant

U. S. Webb, Attorney-General, Arthur Keetch, Deputy Attorney-General, Thomas A. Wood, Thomas Lee Woolwine, District Attorney, Asa Keyes, Deputy District Attorney, for Respondent.

WILBUR, J.—The defendant was charged with the crime of criminal syndicalism under a statute enacted in 1919 (Stats. 1919, p. 281). The indictment in the main follows the language of the statute and the defendant claims that the indictment is not sufficiently specific and that the statute is void for uncertainty, while the respondent relies upon the rule that an indictment in the language of the statute sufficiently charges a statutory offense. As the main contentions of the appellant are based upon the form of the indictment and the uncertainty of the statute, we will set out the charging part of the indictment. The indictment is as follows:

“The said . . . N. Steelik . . . are accused by the Grand Jury of the County of Los Angeles, State of California, by this Indictment, of a felony, to wit, CRIMINAL SYNDICALISM, committed at and in the County of Los Angeles, State of California, and before the finding of this Indictment, as follows, to wit:

“That on or about the 29th day of September, 1919, and before the finding of this Indictment, at the County and State aforesaid, the said defendants did then and there willfully, unlawfully and feloniously, by spoken and written words and personal conduct advocate, teach, aid and abet Criminal Syndicalism and the duty, necessity and propriety of committing crime, sabotage, violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control and effecting political changes, and did then and there willfully, unlawfully, feloniously and deliberately by spoken and written words justify

and attempt to justify Criminal Syndicalism and the commission of and attempt to commit crime, sabotage, violence and unlawful methods or terrorism with intent to approve, advocate and further the doctrine of Criminal Syndicalism as a means of accomplishing a change in industrial ownership and control and effecting political changes; and did then and there willfully, unlawfully and feloniously publish, issue, circulate and publicly display certain books, papers, pamphlets, documents, posters and written and printed matter in other forms containing and carrying written and printed advocacy of teaching and aid and abetment of and advising Criminal Syndicalism, to wit: Advocating terrorism and advising the commission of crime, sabotage, and other willful and malicious damage and injury to property and unlawful acts of force and violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control and effecting political changes; and did then and there willfully, unlawfully and feloniously organize and assist in organizing, and they are and each of them is and each of them knowingly became a member of an organization, society, group and assemblage of persons known and designated as the 'Industrial Workers of the World' and sometimes known and referred to as the 'I. W. W.' and sometimes known and referred to as the 'One Big Union' and which said organization, society, group and assemblage of persons was then and there organized and assembled to advocate, teach, aid and abet Criminal Syndicalism as a means of accomplishing a change in industrial ownership and control and effecting political changes;

"All of which is contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the People of the State of California."

The statute, which we will hereinafter refer to as the Criminal Syndicalism Act, in section 1 defines criminal syndicalism and sabotage as follows:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to

physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

Subdivisions 1, 2, and 3 of section 2 punishes one who advocates or encourages or justifies criminal syndicalism. Section 4 punishes one who assists in organization of a society to teach, aid, or abet criminal syndicalism, and subdivision 5 prohibits the commission of crime in furtherance of criminal syndicalism. Section 2, *inserting therein the definition of "criminal syndicalism" and "sabotage" contained in section 1* in lieu of the words "criminal syndicalism" and "sabotage" contained in section 2, reads as follows:

"1. By spoken or written words or personal conduct advocates, teaches or aids and abets any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, or the duty, necessity or propriety of committing crime, willful and malicious physical damage or injury to physical property, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"2. Willfully and deliberately by spoken or written words justifies or attempts to justify any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, or the commission or attempt to commit crime, willful and malicious physical damage or injury to physical property, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means



of accomplishing a change in industrial ownership or control, or effecting any political change; or

“3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

“4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

“5. Willfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

“Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years.”

Thus it will be observed, the Criminal Syndicalism Act prohibits the advocacy of crime, the organization of conspiracies to commit crime, and the commission of crime, having for its object the bringing about of political or industrial changes.

In considering the sufficiency of the statute and of the indictment, it should be noted that the language is unusually broad and comprehensive as well as tautological, partly because the statute expressly includes accomplices and those who engage in conspiracies to commit the crime denounced.

In defining crime it is not usual for the legislature to include in the definition those who are accomplices. In this state accomplices are liable as principals and may be charged as such. Section 31 of the Penal Code provides as follows: "Sec. 31. Who are principals. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed." Thus, every act in defining a crime under our system of law includes those who aid and abet its commission and such accomplices may be punished as principals for the perpetration of the crime which they aid and abet. [1] The fact that in the Criminal Syndicalism Act the statute *ex industria* includes accomplices and defines with meticulous care numerous acts constituting such aiding and abetting of the principal crime does not render the act uncertain, nor is the fact that the act punishes aiders and abettors of the crime where the crime advocated is not committed a reason for holding the law uncertain. On the contrary, such definition is for the purpose of making the law more certain and explicit.

In the case of *Spies v. People*, 122 Ill. 1, [3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898], we have an instance where those who were responsible for anarchistic propaganda were found guilty and executed for the resultant murder of policemen by a bomb at the Haymarket meeting in Chicago. Our Criminal Syndicalism Act, however, differs from the implied legislation contained in the definition of every crime, in that it punishes aiders and abettors of the crime denounced for their efforts to bring about such crime, even

before the criminal act they seek to bring about has actually been accomplished.

Section 5 provides punishment for those who commit the crime, and section 4 for those who organize or join organizations formed for the purpose of committing such crimes. The members of such an organization would, at common law, be punishable for conspiracy to commit crime.

It seems clear that not more than three crimes are described in the statute: First, the commission of a crime for the purpose of effecting the desired change; second, advocating the commission of such a crime, although it might not have occurred, and where the advocates would not therefore be accomplices in the crime; this would include those who print or write documents in furtherance of such crime; and third, forming a criminal conspiracy for the purpose of committing such a crime.

The aiding and abetting of a contemplated crime, where it is an individual act, is not ordinarily punishable until the crime has been committed. But, if two or more join in the purpose, they become liable, as conspirators under our statute (sec. 182, Penal Code), punishable without any overt act, if the offense agreed to be committed is a felony upon the person of another or to commit arson or burglary. In all other cases it is essential that some overt act in furtherance of the conspiracy occur (sec. 184, Penal Code).

Under our system a person charged with a crime as principal may be convicted of aiding and abetting in that crime (sec. 31, Penal Code). So that an indictment charging a person with committing the crime of criminal syndicalism and also with aiding and abetting the same would be duplicative, if at all, only because aiding and abetting criminal syndicalism is punishable as such under this act where the criminal act advocated is not consummated. The only purpose of charging the defendant with aiding and abetting and advocating crime as well as the crime itself is to charge that advocacy as a crime, distinct from the commission of the crime so advocated. It would seem clear that an indictment so framed as to permit a conviction for the crime advocated and for the advocacy of the crime, if not committed, would charge two separate offenses, and that the law framed so as to cover both would also define two offenses. That subdivisions 1, 2, and 3 of section 2 do define a separate crime

is well illustrated by the fact that the *justification* of crime denounced in section 2, subdivision 2, *supra*, would apply to crimes to be committed and those already committed. Both are covered by section 1, as teaching or advocating crime, and both are punishable because of their tendency to cause new crimes of a similar nature.

The conspiracy denounced in subdivision 4, section 2, is also a separate and distinct crime, which may result in the commission of the crime advocated, in which event the conspirators can be charged as principals in the crime. If no such crime is committed the conspiracy to commit the crime is a separate offense from the crime and from aiding and abetting the crime where the latter is by an individual and not by a combination or organization. If, as a result of a conspiracy, crime is committed, section 2, subdivision 5, alone need be invoked.

In the case at bar no evidence was introduced of the consummation of any crime by the defendant or his associates for the purpose of effecting political or industrial changes. The evidence relied upon in this case for conviction was to the effect that the Industrial Workers of the World, hereinafter referred to as the I. W. W., was an organization which came within the provisions of section 4 and that the defendant was a member thereof. The defendant testified that he was a member of the I. W. W., having joined before the passage of the Criminal Syndicalism Act, and that he remained such member thereafter, and that he participated in the meetings of the organization. There was evidence to the effect that he was an authorized organizer thereof and acted in such capacity and personally advocated revolution and preached some of the doctrines denounced as criminal in the act. There was thus evidence before the jury that the defendant had violated section 2, subdivision 4, of the statute, that is, he knowingly belonged to a conspiracy to commit crimes, in furtherance of industrial and political control.

There is overwhelming evidence in the case at bar to justify a conclusion by the jury that the I. W. W. is an organization as clearly denounced by the statute as unlawful as though it was mentioned by name. It therefore clearly appears from the evidence that the defendant has committed a crime denounced by the statute and is thus justly liable to suffer the penalty imposed by the statute, and there has

been no miscarriage of justice in imposing upon him the penalty prescribed by law for the offense committed by him. Section 4½ of article VI of the constitution provides that no judgment shall be set aside in any cause for any error in pleading or procedure "unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Of course, the mere fact that the record shows the defendant to be guilty of a crime does not conclusively determine that there has been no miscarriage of justice in imposing upon him the penalty prescribed by law therefor, for, if the defendant has not had a fair trial, there has been a miscarriage of justice.

The indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended (Pen. Code, sec. 950), and "It must be direct and certain, as it regards: . . . The particular circumstances of the offense charged, when they are necessary to constitute a complete offense" (Pen. Code, sec. 952), and the indictment is sufficient in that regard if "the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended" (Pen. Code, sec. 959, subd. 6). "The indictment may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, . . . " (Pen. Code, sec. 954).

Assuming that the indictment is sufficiently definite and certain in charging several different offenses, no injury resulted to the defendant by reason of a failure to separate the charge into separate counts. Indeed, he is the gainer thereby, as only one penalty can be imposed.

It is claimed that the indictment in this case is so broad and comprehensive in its allegations, so indefinite and uncertain in its specifications, that the defendant was not properly advised of the nature of the charge against him, and was thus convicted without that due process of law

guaranteed to him by the federal and state constitutions. It is true that the language of the indictment is very comprehensive and would justify the proof of a multitude of acts which would be comprehended within the terms of the statute and the indictment thereunder. On the other hand, it is specifically alleged in the indictment that the defendant was a member of the I. W. W., knowing its alleged purposes. As to that charge he was therefore fully advised, and the evidence clearly shows his guilt. The evidence introduced against the defendant was all germane to that charge. The evidence as to the character of the organization and his membership was admissible to support the charge, and the testimony as to his statements and activities were admissible to show his knowledge of and sympathy with the purposes of the organization. No evidence is called to our attention which was not pertinent to this specific charge.

[2] We are thus confronted with the question as to whether or not we should reverse this case because the indictment was comprehensive enough to charge in too general terms acts and offenses, not in fact proved, where it clearly and specifically charged the offense proved on the trial, and no other offense or acts were proved or offered to be proved. The general rule is that surplusage may be rejected if sufficient remains in the indictment to charge the offense proved and that uncertain and duplicitous averments may be treated as surplusage and rejected. (22 Cyc. 367-369.) Under this rule the indictment was sufficient to support the judgment.

If we are correct in holding that the only just criticism of the indictment is that it included other offenses than the specific one of knowingly remaining a member of the I. W. W. and that the evidence was in fact confined to that issue, then we are directed by the constitution not to reverse the judgment against the defendant for any error as to any matter of pleading, "unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." It is clear that mere surplusage in the indictment would not result in any miscarriage of justice as to a crime specifically charged and upon which upon proper evidence the defendant was found guilty.

The defendant also complains of the trial for the reason that he is entitled to have the allegations against him re-

duced to such form that, in the event of either an acquittal or conviction, he cannot be again tried for the same offense, and that the indictment is not sufficiently certain to protect him in that regard. The rule invoked by the defendant is one for the testing of the sufficiency of an indictment (*People v. Mahony*, 145 Cal. 104, 106, [78 Pac. 354]), and is entitled to consideration under the rule which limits the power of this court on appeal (art. VI, sec. 4½). We think it clear, however, that the evidence and verdict are directed to the membership of the defendant in the I. W. W. and that this prosecution would bar another on that issue. It is therefore unnecessary to consider whether it would bar a prosecution for some other act included therein. If so, he is to that extent benefited by the unnecessary averments of the indictment, and is not prejudiced in this case thereby.

[3] We are not required in the case at bar to determine whether or not the general language of subdivisions 1, 2, and 3 is sufficient when used in a statute to define an offense or in an indictment to charge an offense, for the reason that the defendant is specifically charged with belonging to the I. W. W. and thus an offense is charged under subdivision 4, section 2, of the act.

[4] Appellant attacks the constitutionality of the statute because it denounces acts and conduct "as a means" of accomplishing political change or change in industrial ownership, thus leaving to a court or jury to determine whether or not the particular act or conduct of the defendant is adapted to the result denounced by the statute. In considering that question it should be noted that the Criminal Syndicalism Act does not undertake to define the various acts, the advocacy of which is punishable under the statute. Such acts are already denounced as wrongful under existing laws. They are (1) the "commission of crime," (2) "willful and malicious physical damage to physical property," (3) "Unlawful acts of force and violence," (4) "Unlawful methods of terrorism." We must look to the general law of the state to determine what are "unlawful acts of force and violence," and what are "unlawful methods of terrorism," and to ascertain what acts are crime. The "malicious physical damage to physical property" is evidently synonymous with malicious mischief and arson, and other unlawful acts resulting in the damage to or destruction of



physical property. These wrongful acts, most of them already punishable by the criminal law, are denounced by the statute and made felonious when done, or advocated as a means of political or industrial change. The Criminal Syndicalism Act might be summarized as an act to punish the advocacy of crime or wrong, engaging in conspiracies to commit crime or unlawful acts, or the commission of crime or unlawful acts as a means of changing industrial or political control. It is proper to seek desired changes in political and industrial control, but when criminal or unlawful means are used to effect political control, the means is punishable under the act defining and prohibiting criminal syndicalism, as well as under the act defining the crime. The latter act is no more uncertain than the one denouncing criminal conspiracy as a conspiracy to commit any act "injurious to the public health" "or to public morals" or the "perversion and obstruction of justice" "or due administration of the laws." (Sec. 182, Pen. Code.)

This same question was considered by the supreme court of the state of Washington in *State v. Hennessy*, 114 Wash. 351, [195 Pac. 211, 215], and in *State v. Fox*, 71 Wash. 185, [127 Pac. 1111]. An act defining criminal syndicalism was sustained in the former case, and an act defining criminal anarchy in the latter case. Both acts were couched in much the same language as our Criminal Syndicalism Act. Without further discussion we accept the conclusions of the supreme court of Washington in *State v. Hennessy*, *supra*, and, although the statute there under consideration is somewhat different in terms from ours, the principle there announced is fully applicable here.

We have twice had before us the question of the validity of this act: *In re McDermott*, 180 Cal. 783, [183 Pac. 437], where an application for a writ of *habeas corpus* was denied, and in *Whitney v. Superior Court*, 182 Cal. 114, [187 Pac. 12]. In the case of *In re McDermott*, *supra*, the application for a writ of *habeas corpus*, after defendant had been held to answer, was based upon the grounds that the defendant had been held to answer without probable cause and that the law was unconstitutional. It appears from an examination of the petition therein that the points specified by the petitioner in that case as the basis for the claim of the unconstitutionality of the statute were "the ambiguity of the

statute in that a person of common intelligence cannot understand just what not to do in order not to violate any of its five subdivisions of section 2, in this, to wit: That it cannot be ascertained by reading said law whether it is a crime and a violation of said act for any person to read in public any book, paper, pamphlet, document, poster or written or printed matter in any other form; to use the language of the act; containing, or carrying written or printed advocacy, teaching, or aid and abetment of, or advising 'criminal syndicalism' as set out in subsection 3 of said act, if in said reading the person publicly displays said book, pamphlet or other written or printed matter, no matter how innocent of violating said law said person might be; that the act was ambiguous in that it cannot be ascertained therefrom just what is meant by 'unlawful methods of terrorism' as contained in section 1 of said act and elsewhere, as a person of common intelligence would reasonably conclude after reading said act that there is such a thing as 'lawful methods of terrorism'; that the complaint under which the petitioner was held was also defective and void in that it did not state a public offense because it is not sufficiently direct and certain," etc. The petition was filed July 25, 1919, and was denied July 31, 1919, without argument, because the court was thoroughly satisfied that the law was immune from the attack against it. The evidence upon which the petitioner was held to answer in that case, as in this, showed that the defendant was a member of the I. W. W. and had knowledge of its character. The decision in the McDermott case upholds the constitutionality of the Criminal Syndicalism Act in so far as it defines the crime mentioned in subdivision 4, section 2. We have considered the arguments made here attacking the constitutionality of the law, and see no reason to change the conclusion reached in the McDermott case (*supra*).

In the case of *Whitney v. Superior Court et al.*, *supra*, an application was made for writ of prohibition to prevent the superior court of Alameda County from proceeding with the trial of the petitioner upon an information charging the petitioner with violating the Criminal Syndicalism Act. This court in denying the petition said: "We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of provisions of

our federal and state constitutions." The point of attack in that case as to the constitutionality of the law was that it violated section 24 of article IV of the constitution prohibiting a legislative act embracing more than one subject.

[5] Notwithstanding these decisions in general terms approved the constitutionality of the statute, the defendant argues with great learning that the statute under consideration violates the right of free speech guaranteed in the federal and state constitutions and for that reason is unconstitutional and void.

The right of free speech was guaranteed to prevent legislation which would by censorship, injunction, or other method prevent the free publication by any citizen of anything that he deemed it was necessary to say or publish. (See notes, 15 Ann. Cas. 3, 4; 6 R. C. L., sec. 239 et seq.) The right of free speech does not include the right to advocate the destruction or overthrow of government or the criminal destruction of property. The Criminal Syndicalism Act does not violate the right of free speech. (*State v. Hennessy, supra*; *People v. Most*, 171 N. Y. 423, [58 L. R. A. 509, 64 N. E. 175].) It is expressly provided in our constitution that the publisher is liable for an abuse of this power and for any unlawful publication. This statute does not prevent the publication; it punishes the publisher, and declares punishable the character of publication denounced by the act as illegal. The legislature has power to punish propaganda which has for its purpose the destruction of government or the rights of property which the government was formed to preserve. (*People v. Most, supra*.) It is clear that the statute does not violate the right of free speech as defined by law. [6] The defendant, however, is not in a position to raise the point, for he is not charged with or convicted of a violation of the Criminal Syndicalism Act involving anything that he said or published as hereinbefore indicated.

[7] Appellant contends that the offense with which he is charged comes under the common-law definition of constructive treason, and that therefore he cannot be punished because of the definition of treason contained in the federal and state constitutions. These definitions are merely for the purpose of limiting the number of offenses which can be punishable as treason under the common law, and in nowise

✓ limits the power of the legislature to provide for the punishment of acts inimical to the public welfare which theretofore might have been punished as constructive treason. (*State v. Hennessy, supra; Ex parte Bollman*, 8 U. S. (4 Cranch) 75, [2 L. Ed. 554, see, also, Rose's U. S. Notes].)

On the whole, therefore, we hold that the record justifies the conviction of the defendant of the offense of criminal syndicalism in that he knowingly belonged to an organization which in its nature was a criminal conspiracy to change industrial control and government by unlawful and criminal methods.

It remains to consider the various objections to the evidence presented by the defendant. The principal one is to the testimony of two members of the I. W. W. as to various criminal acts committed by members of that organization before the defendant joined the organization and before the passage of the Criminal Syndicalism Act. It is urged that the defendant is not bound by the conduct of his associates before he joined with them, and that to convict him in this proceeding with a violation of a statute subsequently passed would make the law, in effect, an *ex post facto* law.

[8] In this case, the only question the defendant can be heard upon is whether or not the evidence of the conduct of members of the I. W. W. before the passage of the act is admissible as tending to establish the character of the organization after the passage of the act and during the time the defendant belonged thereto. It seems too clear for discussion that where the issue involves the character of an organization it is proper to determine the character of the organization from the conduct of its members and officers, including the propaganda which it publishes. It is no doubt true that the presumption of innocence would overcome the legal presumption that when the nature of a thing is once shown, it is presumed that it continues thereafter as long as such thing usually continues (Code Civ. Proc., sec. 1963, subd. 32). But where such proof is fortified by actual proof that subsequent to the passage of the act the organization continued to publish the same sort of propaganda, it is proper to consider the evidence of the conduct of the organization both before and after the passage of the statute in order to determine whether or not it is such an organization as is denounced by the statute. As the defendant knowingly con-

tinued his membership in the organization after such conduct had been denounced by the statute as criminal, he is liable, not for what the organization did before he joined it or for its character before the statute was passed, but because after the statute was passed he violated the terms thereof by knowingly remaining a member thereof.

It is contended that the evidence of these members of the I. W. W. was inadmissible for the further reason that it consisted of declarations of co-conspirators and was not admissible until the conspiracy was established by other evidence than such declarations. In making this contention the appellant wholly misconceives the applicability of the rule with reference to the declarations of co-conspirators. The evidence adduced in court by the co-conspirators as witnesses are not declarations of conspirators, but direct testimony to the facts to which they testify. Aside from the discredit which attaches to them as accomplices, their evidence is entirely competent to establish the facts to which they testify. The rule for which counsel contends is applicable only when it is sought to introduce extrajudicial declarations and statements of co-conspirators.

[9] Probably the most serious complaint made by appellant is that of misconduct on the part of the district attorney in his argument to the jury. It was partly because of the character of the argument, portions of which were set out in the opinion of the district court of appeal of the second district, second division, that we ordered a transfer to this court. The misconduct alleged consisted of vigorous and scathing denunciation of the defendant and particularly of his counsel. During this denunciation the defendant made no objection. He neglected to call the attention of the court to the character of the argument and statements or the prejudicial effect anticipated therefrom. The court however, instructed the jury that it must disregard the remarks of the counsel and not consider them as evidence, and would only be justified in convicting upon the evidence upon the trial of the case. It is well settled that an appellate court will not consider a claim as to the misconduct of counsel in argument unless objection is made at the time. (*People v. Fleming*, 166 Cal. 357, 371, 377, [Ann. Cas. 1915B, 881, 136 Pac. 291].)

Appellant claims that the remarks of the district attorney were of such a prejudicial character as to have precluded any possible curative action by the trial judge, and for that reason asks us to reverse the judgment. Assuming that the remarks of the district attorney were as prejudicial as counsel claim them to be, we must also assume that if seasonable objection had been made to that course of argument or conduct the district attorney would have refrained from other and further improprieties in his argument, failing in which the judge would have promptly and emphatically prohibited further violation of the proprieties by the district attorney. This being true, we have no means of ascertaining whether or not the more flagrant violations complained of and the most prejudicial remarks of the district attorney would have ever occurred if, at the beginning, the defendant, instead of sitting silently by, had made seasonable objection thereto. In any event, we cannot properly disregard the rule requiring that objection be made to prejudicial misconduct of the district attorney, as a basis for a complaint in this court.

Judgment affirmed.

Sloane, J., Shaw, J., and Lennon, J., concurred.

Rehearing denied.

All the Justices concurred.

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[Crim. No. 2358. In Bank.—November 12, 1921.]

THE PEOPLE, Respondent, v. JOHN C. TAYLOR, Appellant.

[1] CRIMINAL LAW—VIOLATION OF SYNDICALISM ACT—INDICTMENT—SPECIFICATION OF ACTS.—An indictment charging a defendant with the commission of acts in violation of subdivision 5 of section 2 of the Criminal Syndicalism Act of 1919 (Stats. 1919, p. 281), should contain a specification of such acts.

[2] ID.—MEMBERSHIP OF UNLAWFUL ORGANIZATION — INDICTMENT — FAILURE TO STATE NAME—LACK OF PREJUDICE.—The failure to name the organization in an indictment charging a defendant with being a member of an organization denounced by subdivision 4 of

section 2 of the Criminal Syndicalism Act, is not a sufficient ground for a reversal of the judgment of conviction, in view of article VI, section 4½, of the constitution, where the indictment sufficiently charged the offense in general terms, and the defendant, who acted as his own counsel, was advised by the district attorney at the beginning of the trial as to the particular organization referred to in the indictment.

- [3] **ID.—CHARACTER OF ORGANIZATION—EVIDENCE—BOOKS AND PAPERS.** In a prosecution under an indictment charging a defendant with being a member of an organization denounced by subdivision 4 of section 2 of the Criminal Syndicalism Act, books, pamphlets, and papers advocating criminal syndicalism and sabotage found at the headquarters of the organization are admissible as tending to show the character of the organization.
- [4] **ID.—QUESTION FOR JURY.**—In such a prosecution, the question whether or not the particular organization was organized to advocate, teach, aid, and abet criminal syndicalism is for the jury to determine, and not for the court to infer as a matter of law.
- [5] **ID.—MEMBERSHIP OF UNLAWFUL ORGANIZATION—SUFFICIENCY OF EVIDENCE.**—In this prosecution under an indictment containing four counts based upon subdivisions 1, 2, 4, and 5 of section 2 of the Criminal Syndicalism Act, the evidence is held sufficient to sustain the conviction on the count of knowingly belonging to an organization advocating criminal syndicalism and sabotage, but not sufficient to support the verdict on the other counts.
- [6] **ID.—ADVOCACY OF DOCTRINES—INDICTMENT—SPECIFIC ACTS.**—An indictment charging a defendant with advocating the doctrine of criminal syndicalism and with printing or circulating books or pamphlets relating to such doctrine should designate the specific acts, and name and describe the books and pamphlets, and the statement of the offenses in the language of the statute is not sufficient.
- [7] **ID.—PRINTING OR CIRCULATION OF LITERATURE—CHARACTER OF—RELATIVE DUTY OF COURT AND JURY.**—In prosecutions for printing or circulating pamphlets, books, or other articles advocating criminal syndicalism, if the articles are in plain and unequivocal terms, it is the duty of the court to construe the meaning and effect of the documents for the benefit of the jury, but if the instruments are susceptible of two interpretations, it is for the jury to say, on proper instructions, whether the documents are unlawful.

**APPEAL** from a judgment of the Superior Court of Alameda County. James G. Quinn, Judge. Affirmed and reversed.

The facts are stated in the opinion of the court.



Austin Lewis and Robert M. Royce for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

WILBUR, J.—The defendant was convicted by a jury of the crime of criminal syndicalism. The indictment contained four counts based upon subdivisions 1, 2, 4, and 5 of section 2 of the Criminal Syndicalism Act of 1919 (Stats. 1919, p. 281). He was convicted upon the first and fourth counts. The first count charged the defendant with the offense of knowingly belonging to an organization advocating sabotage, etc., and the fourth count with committing certain lawless acts defined in subdivision 5 of section 2 of the Criminal Syndicalism Act. The district court of appeal, first district, division one, sustained the conviction as to the first count, charging an offense under subdivision 4 of section 2 of the Criminal Syndicalism Act, and reversed the case as to count 4, charging an offense under subdivision 5. The defendant petitioned for a transfer to this court on the ground of the insufficiency of the indictment. The petition was granted because at the time we had under consideration a similar question in the case of *People v. Steelik*, ante, p. 361, [202 Pac. 361], in which the constitutionality of the statute and the sufficiency of an indictment thereunder were under consideration. It was desired that the matter should be fully considered in that case and that the ruling therein might be applied in this case. If we agree with the holding of the district court of appeal that the evidence is insufficient to sustain the verdict of the jury on the fourth count, then this case becomes almost identical with that of *People v. Steelik*, with the single exception that in the indictment in this case, the name of the organization to which the defendant belonged is not stated. That organization is the Communist Labor Party. On the consideration of the petition for a transfer we were inclined to the opinion that where a defendant was charged with advocating a certain doctrine or printing a certain book or pamphlet or circulating the same, it was essential that the name and description of the book, document, etc., should be contained in the indictment for the information of the defendant. If there had been a conviction under counts 2 and 3 of the indictment

in this case that question would be directly involved here, but in view of the fact that the jury disagreed upon these two counts, they have been dismissed and the question is not now involved in the case. [1] As to the fourth count of the indictment in which the defendant is charged with committing acts in violation of the criminal syndicalism law in furtherance of political and industrial change, it is clear that these acts should have been specified in the indictment. The fact that the jury in the absence of such specifications found the defendant guilty of committing such acts and that the district court of appeal was unable to find any evidence in the case which justified such a conviction merely emphasizes the fact that the acts charged to have been committed should have been specified. If the crime of arson, or murder, or larceny, or malicious mischief was intended to be charged by the indictment, that charge should have been made specifically so that the defendant would be advised as to the particular charge he was called upon to meet in his defense. [2] Inasmuch as we agree with the conclusion of the district court of appeal that there was no evidence upon which to justify a conviction upon this count and, therefore, concur in the conclusion of that court that the judgment must be reversed upon that count, the only question remaining in the case with reference to the sufficiency of the indictment, in view of our decision in *People v. Steelik, supra*, is the question as to whether or not a charge that the defendant was a member of an organization denounced in subdivision 4 of section 2 of the Criminal Syndicalism Act is sufficient where it states the offense in the language of that subdivision without naming the specific party or organization to which the defendant is alleged to have belonged. If, however, the indictment is broad enough in its terms to include the Communist Labor Party, as is the case here, in testing the sufficiency of the indictment we are confronted with the provisions of article VI, section 4½, of the constitution, which admonishes us not to reverse cases for mere defects in the pleadings. As the indictment was sufficient to charge the offense specified in subdivision 4 of section 2 of the Criminal Syndicalism Act in general terms, we are called upon to determine in this case whether the failure to name the organization to which the defendant was alleged to belong resulted in a miscarriage of justice.

The defendant in this case acted as his own counsel and upon the *voir dire* of the jury asked the district attorney to specifically state what organization or party was referred to in the indictment for which it was intended to prosecute him. The district attorney replied, "Communist Labor Party," so that during the actual trial of the case there was no doubt in the mind of the defendant as to the organization with which he was charged with affiliating. The defendant testified on his own behalf not only that he was a member of the Communist Labor Party, but also that he had participated in its organization thereof at Chicago, Illinois, and also of the local branch in Oakland, California, and was the secretary of the local organization. In his brief on appeal he states: "One question is presented by the evidence, 'Is the Communist Labor Party of California an organization within the scope of subdivision 2 [4], section 2 of the act.' " He also states in his brief: "There is evidence and we admit that defendant went to Chicago and was in a minor capacity one of the organizers of the Communist Labor Party of America, all of which is material, if at all, for the sole reason that it shows that he knew of the purposes and objects of the party. There is evidence and we admit that the defendant took a prominent part in the organization of the Communist Labor Party of California, and the latter party affiliated with the Communist Labor Party of America. These facts could have been presented to the jury in ten minutes and the defendant never denied them." The defendant was thus fully advised, by the statement of the district attorney in response to his question, that the organization intended to be designated by count 1 of the indictment was the Communist Labor Party. In the absence of some indication in the record or some claim on appeal that the defendant was surprised by the method in which the charge against him was made and proven, we cannot see that the defendant was prejudiced by the failure to mention the name of the organization to which it is charged he belonged. He was fully advised by the indictment that he was charged with belonging to an illegal organization and fully advised by the statement of the district attorney that the particular organization intended was the one in which his membership was admitted. There was no miscarriage of justice in this case resulting from the failure to specify the

organization intended, and this court cannot reverse the judgment of conviction, even though it is clear that the indictment should have stated the name of the organization to which it was claimed defendant belonged.

[3] Error is assigned in the admission of testimony offered by the people consisting of books, pamphlets, and publications found at the headquarters of the Communist Labor Party in Oakland. This testimony was all received for the purpose of showing the character of the organization to which the defendant belonged and his knowledge of that character. It is true, as the defendant contends, that the mere possession of books and documents advocating criminal syndicalism and sabotage would not be sufficient evidence to convict of the crime of criminal syndicalism. Such evidence, however, was admissible as tending to show the character of the organization and was supplemented by other proof with reference to the nature and character of the organization, including debates over the policy of the organization in which the defendant participated, the constitution of the organization and propaganda prepared for its use, coupled with evidence that it indorsed the I. W. W. and had possession of literature used by that organization. The possession of the documents and pamphlets in question, taken alone, would be insufficient to characterize the organization, but it was one item in the evidence tending to show the nature of the organization, the weight and effect of which under the circumstances was to be determined by the jury.

The defendant calls attention to the ruling of the supreme court of the state of New Jersey in the case of *State v. Gabriel* (N. J.), 112 Atl. 611, and also to the opinion of Judge Anderson in *Colyer v. Skeffington*, 265 Fed. 17. The New Jersey case is cited as authority for the proposition that subdivision 4 of section 2 of the Criminal Syndicalism Act of this state is unconstitutional as violating the right of free assembly. The court in that case carefully distinguished the statute there held unconstitutional from one previously held valid by the supreme court of New Jersey in the case of *State v. Tachin*, 92 N. J. L. 269, [106 Atl. 145]. The statute held unconstitutional denounced an organization "promoting or encouraging hostility or opposition to the government of the United States or to the state of New Jersey." This was held to violate the constitutional right of the people to freely

assemble and consult together for the common good, etc. This decision has no application to a statute such as ours, which denounces organizations formed for the purpose of committing crimes against persons and property in furtherance of political or industrial changes. Our statute, on the contrary, is similar to that held constitutional in *State v. Tachin*, *supra*, and carefully distinguished in the later case of *State v. Gabriel*, *supra*. The decision by Judge Anderson in *Colyer v. Skeffington*, *supra*, represents the conclusion of that judge upon the evidence there submitted as to the character of the Communist Labor Party and as to whether or not it violates the federal statute authorizing the deportation of undesirable aliens. The question we are called upon to determine is whether the evidence is sufficient in this case to justify the finding of the jury that the Communist Labor Party is such an organization as denounced by the law. As pointed out in the opinion of the district court of appeal, there was abundant evidence to sustain this conclusion by the jury. We approve and adopt the following conclusions of the district court of appeal:

“Subdivision four of section two of the act provides that anyone who organizes, or assists in organizing, or is, or knowingly becomes a member of any organization, society, group or assemblage of persons, organized or assembled to advocate, teach or aid and abet criminal syndicalism, is guilty of a violation of the statute. The first count of the indictment upon which appellant was convicted is based upon this subdivision. He contends that the evidence does not support the finding of the jury and the verdict of imprisonment entered thereon. Under this phase of his appeal he attempts to narrow consideration to the question of whether or not the Communist Labor Party of California and the Communist Labor Party of America are organizations within the scope of the inhibitions of the criminal syndicalist act. Stated in another way, as we understand appellant's position, his contention is that in arriving at a decision in this matter the jury based its decision largely upon its interpretation of the constitution, platform and other documents setting forth the aims and objects of the communist parties, and that the construction of these documents was really a question of law for the court, and that, as a matter of law, the only evidence introduced in the case does not establish that the

organizations named fall within the purview of the statute. This contention is plausible, but it is not sound, even if the issues were narrowed to the extent that the appellant would have us go. The authorities appear to be all to the contrary. Were it only necessary in the instant case to determine the beliefs, plans and prospective actions of a large number of people organized in so-called political parties, it would be a question of fact. (*Colyer v. Skeffington*, 265 Fed. 17, 56.) [4] Whether or not the communist labor party of America, particularly the communist labor party of California, in the organization of the latter of which appellant took part, were organized to advocate, teach, aid and abet criminal syndicalism, was for the jury to determine and not for the court to infer as a matter of law. (*Kumpula v. United States*, 261 Fed. 49, 51, [171 C. C. A. 645]; *Pierce v. United States*, 252 U. S. 239, [64 L. Ed. 542, 40 Sup. Ct. Rep. 205, 209]; *Schenck v. United States*, 249 U. S. 47, 52, [63 L. Ed. 470, 39 Sup. Ct. Rep. 247]; *State v. Moulen*, 140 Minn. 112, [1 A. L. R. 331, 167 N. W. 345, 348]; *People v. Malley* (Cal. App.), 194 Pac. 48.)

“There was evidence in this case from which the jury might not be, and evidently were not willing to draw as favorable conclusions of the aims and objects of the so-called political parties to which defendant belonged, as the appellant would have us reach. Again, the activities of the appellant do not appear to have been merely confined to his being ‘in a minor capacity one of the organizers of the Communist Labor Party of America,’ and taking ‘a prominent part in the organization of the Communist Labor Party of California.’ It appears from the record that he was at one time a member of the Industrial Workers of the World, an organization commonly known as the I. W. W. When his membership in that organization ceased, if it ever did, does not clearly appear from the record. He was also state secretary and organizer for the socialist party. He conceived and broached to Alverson, a state organizer for the party and who was a witness for the people, a plan to gain control of the ‘Local’ of the socialist party, with which they were affiliated, by inducing and securing a large number of members of the Industrial Workers of the World to become members of the socialist organization, thereby affording the opportunity of transforming the socialist party from a po-



V litical to a revolutionary party. With others, Taylor was a delegate to a gathering or convention of a faction, or 'left wing,' of the socialist party which met in Chicago. Dissension appears to have arisen in the meeting and a portion of the delegates either withdrew or were excluded from its deliberations. They repaired to the hall of the I. W. W. in Chicago and proceeded to organize the Communist Labor Party of America. The constitution, platform and manifesto of that organization were admitted in evidence, as were a number of reports of the proceedings of that so-called party. In the platform and program of the Communist Labor Party the organization declares itself in 'complete accord with the principles of communism, as laid down in the Manifesto of the Third International formed at Moscow,' and calls upon the working class to organize and train itself for the capture of state power by the establishment 'of organs of administration created and controlled by the masses themselves, such, as, for example, the Soviets of Russia.' The platform also declares for the transfer of private property and the means of production and distribution to the working class government, to be administered by the workers themselves, and calls upon the revolutionary working class movements of all countries to closely unite. That manifesto advocates 'the disarming of the Bourgeois at the proper time, the arming of laborers and the formation of a Communist army as the protector of the rule of the proletariat and the inviolability of the social structure.' Such, according to the manifesto, is the red army of soviet Russia, which is declared to be inseparable from the soviet state. 'Conquest of political power,' according to the manifesto, 'means not merely a change in the personnel of ministries, but annihilation of the enemy's apparatus of government; disarmament of the bourgeois, of the counter-revolutionary officers, of the White Guard; arming of the proletariat, the revolutionary soldiers, the Red Guard of Workingmen; displacement of all bourgeois judges and organization of proletarian courts; elimination of control by reactionary government officials and substitution of new organs of management of the proletariat.' The revolutionary era, according to the manifesto, 'compels the proletariat to make use of the means of battle, which will concentrate its entire energies, namely, mass action, with



its logical resultant, direct conflict with the governmental machinery in open combat. All other methods, such as revolutionary use of bourgeois parliamentarism, will be of only secondary significance.' For an interesting discussion of the effect of these declarations see *United States v. Wallis*, 268 Fed. 413.

"In its program, which appears to be part of its platform, the Communist Labor Party favors international alliance only with the communist groups of other countries, those which have affiliated with the communist international. It also favors organized party activity and co-operation with 'class conscious industrial unions, in order to unify industrial and political class conscious propaganda and action, and advocates conduct of the Communist propaganda and organization in the shops and to encourage the workers to organize in One Big Union.' Then follows the declaration that 'in any mention of revolutionary unionism in this country, there must be recognition of the immense effect upon the American Labor movement of the propaganda and example of the Industrial Workers of the World, whose long and valiant struggles and heroic sacrifices in the class war have earned the respect and affection of all workers everywhere. We greet the revolutionary industrial proletariat of America, and pledge them our whole-hearted support and co-operation in their struggles against the capitalist class.'

"Upon the return of Taylor and the other delegates to the Chicago convention to Oakland, steps were taken to form, and there was organized, the Communist Labor Party of California, which was closely allied with, and apparently became an integral part of the parent organization. There seems to be no doubt that its aims, objects and purposes were in full accord and in entire sympathy with the platform and principles of that body, including its allegiance to the soviet movement in Russia. At the outset of the organization meeting, those present gave three cheers for the bolsheviki, and the appellant also led the meeting in singing songs, one of which called upon:

" 'All who right and justice seek,  
Burst your bonds no longer weak,  
Unite and join the Bolshevik.  
Rise! Rise! Rise!'

✓ "Taylor took an active part in the organization of this body. The Oakland local of the socialist party, with which appellant seems to have been allied, seceded from that organization and went into the Communist Labor Party. The appellant outlined an ambitious plan concerning the tactics to be used in accomplishing the ends of the Communist Labor Party. His plan, according to his program, was to bring about a general strike of the workers in all industries and in all governmental offices. The army and navy and the police forces of the country would be paralyzed by the general strike and the failure of telephones and telegraphs, the railroads and food supply. The 'Red Guard,' of which he was to be the organizer, was to step in and immediately take control of all state, county and city offices which were to be ruled and governed by those who were in the 'inner circle,' or those who were to be recognized as leaders of the revolution. This 'Red Guard,' according to the testimony, was to be in process of organization through those interested in the revolution, to be assembled the moment the general strike was called. This inner circle of leaders of the revolution was designated by the number '77.' Taylor referred to the uprising as the 'bloody revolution.' The red guard, it was planned, would seize the police stations and take the banks, moving all the currency and coin to one central place, there to be held by the guard. All newspapers in the locality were to be seized, except one, which, 'as a matter of revolutionary tactics,' should be spared as a medium of spreading the propaganda of the revolutionists. Advantage was to be taken by the party of the alleged unrest caused by German propaganda and discontent among soldiers returning from the war. The red guard, according to Taylor, had spies in the ranks of the American Legion and in and around the police department and in the various offices of the city hall in Oakland. Members of the inner circle had selected hiding places on the Mendocino coast and in the Sacramento valley to utilize in case of emergency.

"In outlining his further plans, according to the testimony, Taylor disclaimed any hope of success of political change through the ballot, and advocated getting results by force. He favored sabotage as a weapon of the working class against the employers and capitalists, such as pulling up rails and derailling trains in railroad strikes, destroying

machinery in factory disturbances and wrecking street cars in traction troubles. He also advocated burning hay stacks in order to bring the farmers to terms. During the time he was advocating all such measures, Taylor was active in the work of the Communist Labor Party. ✓

“Appellant attacks the veracity of the witness Alverson, from whose lips much of the foregoing testimony was elicited, and at the trial attempted to discredit a number of other witnesses. We are not concerned with that question here. The credibility of the various witnesses and the weight to be given to their testimony were matters resting entirely with the jury.

“In addition to the foregoing evidence it was shown that the headquarters of the Communist Labor Party in the City of Oakland had been continually under the surveillance of the police authorities and agents of the federal department of justice. A newspaper, called ‘The World,’ was established there for the purpose of disseminating the propaganda of the organization. In the hallways of the headquarters were news stands on which were displayed and from which were sold books, pamphlets and newspapers. The meeting room of the party was in a hall adjoining. Eventually the place was raided and the police authorities seized a mass of documents and files and carried away a large number of books and pamphlets and a miscellaneous assortment of literature and publications, including copies of The World and other papers, which appears to have been devoted to disseminating the propaganda of the Communist Labor Party. Copies of the publications and documents were admitted in evidence. There was also admitted in evidence, over the objection of defendants, a number of books and publications having to do with the Industrial Workers of the World. There were books on ‘Sabotage,’ by Elizabeth Gurly Flynn, Walker C. Smith and Emil Pouget; ‘I. W. W., Its History, Methods, etc.,’ ‘Revolutionary I. W. W.,’ works on syndicalism, reports of the I. W. W. convention, and books and songs of the organization. Other documentary evidence of like nature was also admitted. Appellant objected to the introduction of this evidence on the ground that it was in no way shown to be indorsed by or a part of the propaganda or platform of the Communist Labor Party, and also on the ground that it was not shown to be the

property of, or in any way connected with either himself or the organization. The court admitted the various publication of this evidence on the ground that it was material to show the purpose, and expressly limited it for the purpose of establishing the nature, aims and objects of the Industrial Workers of the World in view of the approval of that organization and what it accomplished in the platform of the Communist Labor Party. We think this was a correct ruling. It also had a tendency to connect the defendant, more or less intimately, with the organization of the so-called red guard, in which, according to the witness Alverson, he was industriously engaged.

[5] "With the foregoing testimony and all of the other evidence in the case before it, the jury reached the conclusion, under apt instructions from the court, that the appellant was guilty of the charge contained in the first count of the indictment. As we have already held, with citation of authorities, at the outset of the consideration of this phase of the appeal, the matter presented was a question of fact for the jury to determine. We must therefore hold, in view of the lengthy record which we have only epitomized, that the evidence was sufficient to support the finding of the jury on the first count.

"The appellant was also found guilty under the fourth count of the indictment, which charged that he did, by personal acts and conduct, commit acts, advised, advocated, taught, and aided and abetted by the doctrine and precepts of criminal syndicalism, with intent to accomplish a change in industrial ownership and control, and effecting a political change. We are unable to see how conviction of the defendant on that charge can be sustained. The allegation was framed under the fifth subdivision of section two of the act by reference to which, it will be noted, deals with the commission, by personal act or conduct, of any of the things prohibited by the statute, and which are held to amount to the practice of criminal syndicalism. It is not shown that the defendant committed any unlawful act of force or violence, or that he personally, or with others, directed or took part in any 'unlawful methods of terrorism.' It is undoubtedly true, as the record clearly indicates, that the defendant was guilty of advocating sabotage, violence and unlawful methods of terrorism as a means of accomplishing

changes in industrial ownership and control, and effecting political changes. For that reason we are unable to understand why the jury was unable to agree upon a verdict under the second count of the indictment. We are equally unable to comprehend how it arrived at a verdict of guilty under the evidence and instructions of the court upon the fourth count. There is no evidence to warrant conviction upon that charge. ✓

“Appellant complains of the refusal of the court to give certain instructions requested by him. Examination of these instructions clearly demonstrates that they go far afield from the issues involved in this case, and were, in the main, properly refused for that reason. The general right of the masses to strike, and the propriety or impropriety of extending sympathy to the soviet government of Russia, were not issues in this case. Certain portions of the requested instructions which were refused by the court, if segregated, might properly have been given, but the matters there involved were sufficiently covered by other instructions which the court gave. The charge appears to have been fair and comprehensive.

“As to the first count of the indictment, the judgment and the orders denying the motions in arrest of judgment and for a new trial are and each is affirmed. As to the fourth count the judgment and said orders are reversed.”

[6] As the case must be sent back for a new trial upon the fourth count, other points will be considered which may arise on the new trial. With reference to the sufficiency of the fourth count we hold that it does not state an offense because of its utter failure to state generally or specifically any crime or crimes alleged to have been committed by the defendant in furtherance of a change of industrial ownership or of political control. A demurrer thereto should have been sustained. As to the second and third counts of the indictment we do not wish to be understood as holding that an indictment couched in the language of the statute is sufficient where the charge made relates to the advocacy of doctrines or the publication and circulation of books, etc. As each separate act and publication would constitute separate and distinct violations of the statute, the specific acts charged should be designated in the information with certainty. Without such information it would be impossible

for the defendant to make his defense and such information is always given and required in indictments for libel, fraud and similar offenses.

The difficulty resulting from the form of indictment used in this case was very well illustrated by the following colloquy which occurred when the jury returned into court after seven hours' deliberation:

"The Court: Ladies and gentlemen of the jury, have you agreed upon a verdict?

"The Foreman: Your Honor, we are not ready. We wish some further instructions or interpretation of a portion of the indictment. Some of us don't seem to be able to quite grasp the meaning of the wording, and we were rather wandering in the dark, because we don't know what it means.

"The Court: I don't know that the court could go very far, other than read the indictment to you. You might state the question that you desire to be instructed upon.

"The Foreman: Shall I read this portion of the indictment some of us do not understand?

"The Court: What?

"The Foreman: Should I read the portion—

"The Court: I don't know that there is any particular objection to your reading it. You may read it if you desire.

"The Foreman: This indictment charges that Mr. Taylor did then and there unlawfully—this is the portion that we do not understand: 'By spoken and written words, and by personal conduct advocate, teach, aid and abet criminal syndicalism, and the duty, necessity and propriety of committing crime, sabotage, violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change.' . . .

"The Foreman: And then going to the other portion of the third count: 'That the said John C. Taylor did then and there unlawfully, willfully, wrongfully'—this is the part—'by spoken and written words justify an attempt to justify criminal syndicalism, and the commission and attempt to commit crime, sabotage, violence, and unlawful methods of terrorism, with intent then and there to approve, advocate, and further the doctrine of criminal syndicalism.' . . .

"The Foreman: This is the portion we do not understand. They don't both mean the same thing."

The court thereupon read sections 1 and 2 of the Criminal Syndicalism Act and the instructions given on the second and third counts of the indictment and read the third count of the indictment as follows:

“And the said John C. Taylor is accused by the Grand Jury of said County of Alameda, by this indictment, of the crime of felony, to wit, a violation of an act entitled ‘An act defining criminal syndicalism and sabotage, prescribing certain acts and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor,’ approved April 30, 1919, committed as follows: That the said John C. Taylor, prior to the time of finding this indictment, and on or about the 28th day of November, A. D. 1919, at the said County of Alameda, State of California, did then and there unlawfully, willfully, wrongfully, deliberately and feloniously, by spoken and written words, justify and attempt to justify criminal syndicalism, and the commission and attempt to commit crime, sabotage, violence and unlawful methods of terrorism, with intent then and there to approve, advocate and further the doctrine of criminal syndicalism.

“If you are satisfied, to and beyond all reasonable doubt, that the said John C. Taylor, on or about the time alleged in the indictment, and within three years prior to the finding thereof, in the County of Alameda, did then and there, by either spoken or written words, justify or attempt to justify criminal syndicalism, as that term has been defined in the statute referred to, or the commission or attempt to commit crime, or sabotage, or violence, or unlawful methods of terrorism, with intent then and there to approve or advocate, or further the doctrine of criminal syndicalism; then and in such case you should find the defendant guilty under such third count.

“Let me repeat, ladies and gentlemen of the jury, do you feel any clearer now than you did before, on the questions that were bothering you concerning these two counts? The second count in the language, that you have mentioned, Mr. Rowe, reads:

“ ‘And by personal conduct advocate, teach, aid and abet criminal syndicalism, and the duty, necessity and propriety of committing crime, sabotage, violence, and unlawful methods of terrorism as a means of accomplishing a change



in industrial ownership and control, and as a means of effecting a political change.'

"Foreman H. D. Rowe: Yes, your Honor.

"The Court: That is the second count. You will see that it speaks, or charges the defendant, rather, that he did then and there by spoken and written words, and by personal conduct, advocate, teach, aid and abet criminal syndicalism, and the duty, necessity and propriety of committing crime, sabotage, violence, and unlawful methods of terrorism, as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change.

"And the language in the third count that you have pointed out reads as follows—or charges in the following language:

"'Did then and there unlawfully, willfully, wrongfully, deliberately and feloniously, by spoken and written words, justify and attempt to justify criminal syndicalism, and the commission and attempt to commit crime, sabotage, violence, and unlawful methods of terrorism, with intent then and there to approve, advocate, and further the doctrine of criminal syndicalism.'

"The Court: Do you see the difference now, ladies and gentlemen of the jury?

"A Juror: I do, your Honor.

"The Court: And the other ladies and gentlemen of the jury, do they see the difference in these two counts?

"The Second Juror: They are so much alike.

"The Court: You understand the language itself, do you not?

"The Second Juror: Yes, your Honor.

"The Court: One speaks of willfully, wrongfully, deliberately and feloniously by spoken and written words justify and attempt to commit crime, sabotage, violence and unlawful methods of terrorism with intent then and there to approve, advocate and further the doctrine of criminal syndicalism and the other count in the language pointed out charges that the defendant did then and there unlawfully, willfully, deliberately and feloniously by spoken and written words and by personal conduct, advocate, teach, aid and abet criminal syndicalism, and the duty, neces-

sity and propriety of committing crime, sabotage, violence, and unlawful methods of terrorism, as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change.

"It would seem that that count charges the defendant with—that the defendant by spoken and written words and personal conduct advocated, taught, aided and abetted criminal syndicalism, and the duty, necessity and propriety of committing crime, sabotage, violence and unlawful methods of terrorism as a means of effecting a change in industrial ownership and control, and as a means of effecting a political change. While the other count in the language that no attention has been drawn to, charges that he did then and there unlawfully, willfully, wrongfully, deliberately and feloniously by spoken and written words, justify and attempt to justify criminal syndicalism, and the commission and attempt to commit crime, sabotage, violence and unlawful methods of terrorism, with intent then and there to approve, advocate, and further the doctrine of criminal syndicalism.

"Are you satisfied now, do you believe, ladies and gentlemen?

"The Foreman: I am.

"The Court: And you and each of you?

"(The jury answer in the affirmative.)

"The Court: Very well. I hope I have made it plain in discussing or rather, giving the instructions. *I kept close to the legal verbiage for the reason that it was the proper thing and the duty of the Court, and the Court had to do it. I do not desire to analyze the language of the count, since it is in the lawful words and terms that you find it in.*" (Italics ours.)

Thirty-five minutes after these instructions were given the jury returned with a verdict against the defendant on two counts. They could not agree on the other counts.

There were twenty-five exhibits offered by the people, thus summarized in the reporter's transcript:

1. Song.
2. Manifesto.
3. Press and Propaganda Report.
4. Statement of Delegates.

5. Platform and Program.
6. The Truth.
7. Ohio Socialist.
8. Committee on Credentials Report.
9. Report State Conv. World Nov. 14.
10. Letter of Katterfeld.
11. Syndicalism.
12. Charter.
13. Minutes.
14. I. W. W.; Its History, Methods, etc.
15. General Strike, by Haywood.
16. Revolutionary I. W. W.
17. Joe Hill Songs.
18. Preamble and Constitution.
19. Advancing Proletariat.
20. Sabotage, Elizabeth Curley Flynn.
21. Songs, to Fan the Flames, etc.
22. Tenth Convention, I. W. W.
23. Sabotage, Walker C. Smith.
24. Sabotage, Emil Pouget.
25. Resolutions.

[7] In addition thereto there was evidence of speeches and debates participated in by the defendant. There is no reason why the rule pertaining to the trial of libel cases could not be equally applicable to a trial of criminal syndicalism, so far as the relative duty of court and jury with reference to interpretation of documentary evidence is concerned. In a libel case where the language of the article published is clear and definite the court should say whether or not it is a libelous article. (*Van Vactor v. Walkup*, 46 Cal. 124; *Tonini v. Cevasco*, 114 Cal. 266, [46 Pac. 103]; *Mellen v. Times-Mirror Co.*, 167 Cal. 587, [Ann. Cas. 1915C, 766, 140 Pac. 277].)

On the other hand, if the instrument is susceptible of two different interpretations, one of which would be libelous and the other not, it would be for the jury to say, on proper instruction from the court, whether or not the article is libelous under all the circumstances and proofs of the case. (*Van Vactor v. Walkup*, *supra*; *Tonini v. Cevasco*, *supra*; *Mellen v. Times-Mirror Co.*, *supra*.) If a pamphlet, news-

paper, or article circulated by the defendant is in plain and unequivocal terms, it is the duty of the court to construe the meaning and effect of the document for the benefit of the jury.

It appears from the colloquy above quoted, as well as from the general tenor of the instructions given by the court, that the trial judge felt that it was a more conservative, if not a necessary, course to confine the instructions and observations of the court to the general language of the statute and indictment. In view of the general and comprehensive character of these statements the jury should have been more definitely informed, not only concerning the nature of the charge, but the character of the evidence sufficient to support the charge. It is evident that the trial court took the view that the statute was dealing with a course of conduct on the part of the defendant, that is to say, if the defendant in various ways, by pamphlets, by speech, by circulars, newspapers and posters advocated sabotage, this course of conduct in its sum total constituted a violation of the law. On the contrary, as already pointed out here and in the case of *People v. Steelik, supra*, each separate act constitutes a crime. The only way in which the sum total of these acts can properly be presented under one charge is where they resulted in the actual commission of crime or are a part of propaganda carried on by an organization and are thus pertinent, not for the purpose of showing the separate acts of crime, but for the purpose of proving the character of the organization with which the defendant has wrongfully affiliated himself.

In view of the general nature of the charges, of the wide scope of the evidence, and the lack of definiteness in the instructions, we would unhesitatingly reverse the judgment if there had been a conviction on counts 2 or 3. We do not agree with the contention of the attorney-general that a charge under this statute in the language of the statute is sufficient. It is true that as to many crimes an indictment in the exact language of the statute is sufficient, but the fundamental rule which controls in the interpretation of the indictment is that announced in section 959, subdivision 6, of the Penal Code: "That the act or omission charged as the

offense is clearly and distinctly set forth in ordinary and concise language, without repetition, *and in such a manner as to enable a person of common understanding to know what is intended.*" (Italics ours.)

The indictment in this case is no more illuminating in that regard as to counts 1, 2, 3, and 4 than if the defendant had been merely charged with "violating the statute defining criminal syndicalism found in the statutes of 1919, page 281." This is clearly insufficient.

The suggestions herein contained as to the sufficiency of the indictment as to counts 2 and 3 are made because it is clear from the many informations and indictments called to our attention that district attorneys generally are using the general language of the statute in indictments under the Criminal Syndicalism Act. And, in such cases, it is manifest that great injustice may be done a defendant, by a mass of evidence which may establish the commission of many different offenses, not called to the attention of the defendant with sufficient clearness to enable him to prepare an intelligent defense thereto. This is particularly true where a mass of documentary evidence is admitted to establish the character of the organization to which it is alleged the defendant belongs, and where there is also a general charge of criminal syndicalism under subdivisions 1 and 2 of section 2.

As pointed out in *People v. Steelik, supra*, there is no essential difference between "advocating" and "justifying" crime. Either charge covers the other. Hence subdivisions 1 and 2 of section 2 do not state separate offenses.

While appellate courts may be compelled in many cases to affirm convictions under this law, because of article VI, section 4½, of the constitution, because there is no miscarriage of justice in the particular case under review, this fact ought not to encourage a system of pleading or practice under which proper notice of the nature of the offense is given by accident rather than by design. It is well to remember in this type of case that while the defendants may be charged with an attempt to destroy this government, they are as much entitled to its protection, until convicted of crime, as any other citizen or individual, and one of these fundamental rights is that when they are charged with

crime they should know the particular crime they are charged with.

The judgment is affirmed as to count 1 and reversed as to count 4.

Angellotti, C. J., Lennon, J., Lawlor, J., Sloane, J., and Shaw, J., concurred.

Rehearing denied.

All the Justices concurred, except Richards, J., *pro tem.*, and Waste, J., who did not vote.

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[S. F. No. 9538. In Bank.—November 12, 1921.]

ANDREW F. MAHONY, Respondent, v. STANDARD GAS ENGINE COMPANY (a Corporation), Appellant.

[1] SALES—RECOVERY OF DEPOSIT—PLEADING—THEORY OF ACTION—INAPPLICABILITY OF CODE PROVISIONS.—Where an action to recover the deposit paid under an agreement to “furnish and install” gas engines was not upon an express warranty, or the action primarily one to reform a contract and recover damages for its breach as reformed, neither the provisions of section 3308 of the Civil Code, which establishes the measure of damages for the breach of an agreement by the seller to sell personal property not fully paid for in advance, nor of section 3313 of the same code, which prescribes the rule of compensation for the detriment caused by the breach of a warranty of the quality of personal property, were applicable.

[2] ID.—WARRANTY OF MANUFACTURED ARTICLE—INAPPLICABILITY OF CODE SECTION.—An action to recover the deposit paid under an agreement to “furnish and install” gas engines does not fall within section 1770 of the Civil Code, which declares that one who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose, in the absence of an allegation that the defendant manufactured or agreed to manufacture the engines.

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2. Implied warranty by manufacturer or vendor of machinery or apparatus not in itself defective of fitness for use under existing conditions, note, 6 L. R. A. (N. S.) 180.

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- [3] **ID.—CONTRACT FOR SALE OF GAS ENGINES—RESCISSION—REFUSAL TO ACCEPT.**—In view of section 1689 of the Civil Code, which declares that a party to a contract may rescind it where through the fault of the party as to whom he rescinds the consideration for his obligation fails, in whole or in part, the refusal of the purchaser to accept engines tendered which would not develop the stipulated horse-power was a rescission of the contract, without an express statement of rescission.
- [4] **ID.—FAILURE OF CONSIDERATION—ACTION FOR MONEY HAD AND RECEIVED.**—Where a claim for the recovery of a deposit paid on account of the purchase price of gas engines is based upon an alleged total failure of consideration in that the engine tendered did not comply with those to be furnished under the contract, an action for money had and received is maintainable, since in such a case the law raises a promise on the part of the seller to repay the money, and without any previous request.
- [5] **ID.—TOTAL FAILURE OF CONSIDERATION—RECOVERY OF DEPOSIT—FORMAL RESCISSION UNNECESSARY.**—Where gas engines tendered were of no value to the purchaser because of their failure to develop the stipulated horse-power, the failure of consideration was total, and no formal rescission of the contract was necessary before suit to recover the deposit.
- [6] **CONTRACT—MUTUAL MISTAKE—REFORMATION.**—In view of section 3299 of the Civil Code, a contract in writing may be revised for a mutual mistake, so as to truly express the intention of the parties.
- [7] **SALES — RECOVERY OF DEPOSIT — REFORMATION OF CONTRACT — MUTUAL MISTAKE—FINDING.**—In an action to recover the deposit paid under a contract for the purchase of gas engines, wherein the plaintiff also sought a reformation of the contract so as to include a provision as to horse-power alleged to have been omitted by mutual mistake, a finding that the omitted provision was a mistake on the part of the parties to the contract was the equivalent of a finding that it was a mutual mistake.
- [8] **CONTRACT — REFORMATION — WHEN UNNECESSARY.**—Where the reformation of a contract is not for the purpose of enforcing it as reformed or to recover damages for its breach, but to show a total failure of consideration, it is not necessary that it be formally revised.
- [9] **SALES — REFORMATION OF CONTRACT — FINDING.**—A finding in an action to reform a contract for the purchase of gas engines that plaintiff executed the contract in the "belief" that it contained a provision calling for the development by the engines of certain
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6. Mutual mistake as ground for reformation of written instruments, notes, 30 Am. St. Rep. 621; 117 Am. St. Rep. 227; 3 Ann. Cas. 444.



brake horse-power, justifies a reformation of the contract, in view of the general finding that the omission was a mistake on the part of the parties.

[10] ID.—PLEADING — OVERRULING OF DEMURRER — ERROR WITHOUT PREJUDICE.—In such action, error in overruling the demurrer to the complaint for failure to allege whether the omission of the provision as to the engines developing a certain horse-power was a mutual mistake, or a mistake of the plaintiff which the defendant at the time knew or suspected, was not prejudicial, where the answer contained a denial that there was any mistake made by either party and alleged that the contract embodied all conditions intended to be contained therein.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. H. Spaulding, A. F. Lemberger and V. G. Skinner for Appellant.

Henry A. Jacobs and G. B. Blanckenburg for Respondent.

SHURTLEFF, J.—This appeal is upon the judgment-roll alone and is from a judgment in favor of plaintiff against the defendant.

The allegations of the amended complaint, essential to the determination of the questions presented, are that the parties entered into an agreement whereby defendant agreed to furnish and install two gas engines, "240 I. H. P. [Indicated horse-power] . . . for the price of forty thousand (40,000.00) Dollars"; that such agreement was executed in confirmation of a written proposal theretofore submitted by defendant to plaintiff and verbally accepted by the latter, which provided that the engines should develop not less than 150 *brake horse-power*; that it was the intention of the parties that a stipulation to that effect should be included in the contract. That the contract erroneously omitted any reference to, or warranty of, the development of 150 *brake horse-power*; that plaintiff executed said agreement in the belief that said provision was therein contained; that the omission of said provision warranting the development, by said engines contracted for, of 150 *brake horse-*

power was a mistake. "That at the time of entering into said agreement and prior thereto defendant was informed and advised by plaintiff of the particular purpose for which said engines were to be used, and defendant at all times was informed and advised and had actual knowledge that it was required by plaintiff, and that it was necessary that said engines develop not less than 150 brake horse-power, otherwise said engines would be of no use for the purpose required." That defendant at all times, both prior to and at the time of, entering into said contract, agreed with and warranted to plaintiff that each of said engines would actually develop in excess of 150 brake horse-power. That plaintiff, relying upon said warranty and agreement on the part of the defendant, paid defendant the sum of ten thousand (\$10,000) dollars as a deposit on account of the purchase price of said engines.

That thereafter defendant notified plaintiff that the engine mentioned in the said written agreement "would develop only 140 brake horse-power, whereupon plaintiff refused to accept delivery of said engines and demanded a return of said deposit of ten thousand (\$10,000.00) dollars," which defendant refused. The prayer is for a money judgment only, to wit, the sum of ten thousand dollars and interest. The defendant demurred generally and specifically to the complaint, which demurrer was overruled. Whereupon the defendant answered, admitting the execution of the agreement, which is set forth *in haec verba*, but denied all of the aforementioned allegations of the complaint, particularly the one to the effect that it was agreed that the engines should develop 150 brake horse-power, or any other brake horse-power, and averred that the only proposal submitted to the defendant by plaintiff was embodied in the agreement set forth in the answer, which agreement makes no mention whatever of "brake horse-power." It denied that the omission from the contract of a provision warranting the development by the engines of 150 brake horse-power, or any other brake horse-power, was a mistake, or that there was any mistake made by either plaintiff or defendant in the execution of the contract, and averred "that the said contract embodied all and every condition, warranty, and reference intended by the parties to be contained therein." Payment of ten thousand dollars is admitted,

coupled with the averment that it was paid under the terms of the contract set forth in the answer.

The defendant also filed a cross-complaint, which refers to the contract mentioned in its answer, makes it part of such cross-complaint, and alleges upon information and belief that plaintiff entered into a contract with the Standard Oil Company to furnish the latter two engines which would develop "in the amount of 150 brake horse-power," which were the engines covered by the contract between plaintiff and defendant. It is further stated in the cross-complaint that "after the *engine* had been built by the manufacturer as called for in the contract," defendant (cross-complainant) was informed by the manufacturer that it would only develop 140 brake horse-power, although built in accordance with the terms of the contract between plaintiff and defendant. That defendant informed plaintiff of that fact and offered to rescind the contract between plaintiff and defendant "and tender to the said plaintiff the sum of ten thousand dollars" paid by plaintiff to defendant under the terms of the contract, which offer plaintiff refused to accept, "but demanded that this defendant procure the engine from the manufacturer, and in reliance upon the terms of said contract and in pursuance of the said demand" the defendant ordered the "said engines shipped"; that plaintiff refused to take delivery, and that by reason thereof defendant has been damaged in the sum of twenty thousand dollars, upon which amount ten thousand dollars has been paid. A demurrer to the cross-complaint was overruled; thereupon plaintiff answered denying the material allegations of the cross-complaint with the exception that the Standard Oil Company was a corporation, and repeating certain allegations of his amended complaint, and averring that the engines called for by the contract between him and the defendant were "to be installed in a motor boat being constructed by plaintiff for the Standard Oil Company, and which, under the terms of the contract of plaintiff with said Standard Oil Company," it was "agreed would develop 150 brake horse-power," of which the defendant at all times had knowledge.

The necessity for the foregoing exhaustive *résumé* of the pleadings is apparent from what follows.

The court made its findings covering every material issue raised by the pleadings and rendered judgment in favor of

plaintiff, from which judgment defendant prosecutes this appeal.

The defendant contends that the judgment is erroneous because not supported by the findings in the following particulars: *First*—That there was no expressed or implied warranty as to brake horse-power; that the engines tendered by defendant were in full performance of the contract and that plaintiff, in not accepting them when tendered, violated his contract. *Second*—“That plaintiff has mistaken his remedy in seeking to recover the part payment for the reason that the findings show that he has at all times refused to cancel the contract even after knowledge that the engines would not develop over 140 brake horse-power; that he has not rescinded nor offered to rescind and that he has not sought to reform the contract and sue for the damages sustained by reason of the alleged breach of the reformed contract.”

[1] We think most of the foregoing contentions are predicated upon a misconception by defendant of plaintiff's cause of action and the theory of his claim for recovery. He is not suing upon an express warranty as to brake horse-power, neither is the action primarily one to reform a contract and recover damages for its alleged breach as so reformed. We agree with defendant that neither the provisions of section 3308 of the Civil Code, which establishes the measure of damages for the breach of an agreement by the seller to sell personal property, not fully paid for in advance, nor of section 3313 of the same code, which prescribes the rule of compensation for the detriment caused by the breach of a warranty of the quality of personal property, are applicable here. [2] Furthermore, this is not a case falling within section 1770 of the Civil Code, which declares that “one who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose,” for it is not alleged, nor found, that the defendant manufactured, or agreed to manufacture, the engines covered by the contract—his undertaking was “to furnish and install” them.

[3] Plaintiff's claim for the recovery of the ten thousand dollars paid by him on account of the price of the engines in question is based upon an alleged total failure of the consideration upon which it was paid in that the engine tendered did not comply with those to be furnished under

the contract which the court found was entered into by him with the defendant. In short, the action is for money had and received, which this court has held may be maintained whenever an equity or legal right arises from the circumstances that one person has money which he ought to pay to another. (*Quimby v. Lyon*, 63 Cal. 394.) In such a case, the law raises a promise on the part of the receiver of the money that he will pay it to the person entitled thereto, and that, too, without any previous request. (*Hawley v. Sage*, 15 Conn. 52, 56.) The gist of the present action is, that the law will not permit defendant to retain money paid it for an article which the trial court found failed to comply with what defendant had agreed to furnish plaintiff.

[4] The code declares that a party to a contract may rescind it where "through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part." (Civ. Code, sec. 1689.)

The following, taken from *S. C. V. Peat Fuel Co. v. Tuck*, 53 Cal. 304, is in point: "The substance of the complaint was, that the defendant, by a written contract [a copy of which was annexed to the complaint], had agreed with the plaintiff to construct a peat machine and its appurtenances within sixty days, at his own expense, and put the same in running order at a point on the San Joaquin River. The contract specifies the machinery, and as a part of it a scow of certain proportions; and the complaint avers that at the time of the execution of the agreement and soon thereafter the plaintiff paid to the defendant in advance, as a part of the contract price, several sums of money, amounting in the aggregate to four hundred and thirty-three dollars and fifty cents, and that though the time for performing the contract by the defendant had elapsed, he had never 'built, furnished, or put in running order, any peat or other machinery, . . . and refused so to do; and said plaintiff has never accepted any machinery from said defendant.' We think this is substantially an averment that the defendant had failed and refused to perform any part of the contract; and the action is to recover the money advanced, on the ground that the consideration upon which it was paid had wholly failed. The authorities appear to be uniform to the effect that where a sum of money has been paid upon a consideration which

has entirely failed, the law implies a promise to refund it." (See, also, *Rose v. Foord*, 96 Cal. 152, [30 Pac. 1114]; *Richter v. Union Land etc. Co.*, 129 Cal. 367, [62 Pac. 39].)

We cannot concede the correctness of defendant's contention that there was no rescission of the contract in question by plaintiff. It is true that the court found that defendant at one time offered to cancel the contract, which offer was refused, and that plaintiff demanded that defendant fulfill it, but the court further found "that *thereafter* defendant tendered to plaintiff . . . the same engines that defendant notified plaintiff would develop only 140 brake horse-power; that plaintiff refused to accept [them] . . . and thereupon demanded of said defendant the return of the said deposit of ten thousand dollars." This is clearly a finding of rescission by plaintiff, and it was in fact a rescission; plaintiff could not have done more, except, possibly, to have said, which would have added nothing to the efficiency of the rescission, "I rescind the contract existing between us."

[5] In *Richter v. Union Land etc. Co.*, 129 Cal. 367-373, [62 Pac. 39], this court said: "Nor, where the failure of the consideration is total—which implies, of course, that nothing of value has been received under the contract by the party seeking to rescind—is it necessary that a formal rescission be made before bringing suit. In such cases a suit may always be maintained for the recovery of the consideration paid. . . . In the authorities cited (except one) it is held that, where there has been a total failure of consideration as to one party, the law implies a promise on the part of the other to repay and what has been received by him under the contract." In the case at bar the failure of consideration was total, for it clearly appears from the findings that unless the engines developed not less than 150 brake horse-power, they would be of no use for the purpose required, and hence of no value to plaintiff.

[6] Appellant correctly affirms that the law is well settled, to use the language of the statute, that "the execution of a contract in writing, . . . supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument" (Civ. Code, sec. 1625), and adds that such prior "negotiations and agreements cannot be availed of by either party to

vary the terms of a subsequent written instrument," but, as the findings indicate was done, the plaintiff in offering, and the court in receiving, evidence tending to show that the agreement of the parties was that the engines should develop 150 brake horse-power, did not transgress this well-established principle of law. It was not an attempt to vary, and, if satisfactorily established, did not *vary*, the terms of the contract. Its purpose was to revise the contract, which, due to a mutual mistake of the parties thereto, did not, as written, truly express their intention—a remedy expressly given by section 3399 of the Civil Code, which provides: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." [7] The court found "that the omission of said provision stating that said engines contracted for would develop 150 brake horse-power was a mistake on the part of the parties hereto," which was the equivalent of finding that it was a mutual mistake.

[8] It is not necessary that the contract be formally revised (*Gardner v. California Guarantee Inv. Co.*, 137 Cal. 71, 75, [69 Pac. 844]), and especially in a case where, as here, the reformation is not for the purpose of enforcing it as reformed, or seeking damages for its breach, but to show a failure of consideration. Moreover, there is no allegation that the rescission prejudiced rights acquired by a third person.

The authorities cited by respondent to the proposition that a contract cannot be revised by a party thereto because of an omission due to his own negligence are not pertinent to the discussion of any of the questions arising here, for there is no finding that the mistake was due to the negligence of plaintiff.

[9] Defendant further urges that the finding that plaintiff executed the agreement in the belief that it contained the provision which called for the development by the engine of 150 brake horse-power does not justify a reformation of the instrument. In view of the fact that there is a general



finding that such omission “was a *mistake* on the part of the parties,” which was the *ultimate fact to be found*, we can see no merit in this contention. Moreover, the “belief” of plaintiff was in the nature of a probative fact and in no manner inconsistent with the ultimate fact found—indeed, it tends to sustain the latter finding.

[10] There remains for consideration the contention that the amended complaint, as framed, does not raise the issue of “mutual mistake.” It alleges “that the omission [from the contract] of said provision warranting the development by said engines contracted for of 150 brake horse-power was a mistake,” which allegation was challenged by the special demurrer upon the ground of uncertainty in that it failed to state whether it “was a mutual mistake of the parties, or a mistake of plaintiff which the defendant at the time knew or suspected,” which is practically the language of the section of the code just quoted. As we have said, the demurrer was overruled. While we think this was error (*Peasley v. McFadden*, 68 Cal. 611–616, [10 Pac. 179]), it was not prejudicial to defendant, since it did not affect any of its substantial rights. (Code Civ. Proc., sec. 475.) Its answer indicates that it construed the complaint as alleging that the mistake in it mentioned was a mutual one, for it contains a denial that “there was any mistake made by either the plaintiff or this defendant in the execution of the said contract,” and, in addition, states the following: “and in this behalf defendant alleges that the said contract embodies all and every condition, warranty, and reference intended by the parties to be contained therein.”

The pleadings and the finding of the court hereinbefore mentioned indicate that the issue of mistake was fully presented at the trial.

We find no error in the record justifying a reversal, and are of the opinion that the findings amply support the judgment, and it is therefore affirmed.

Sloane, J., Lennon, J., Angellotti, C. J., Lawlor, J., and Shaw, J., concurred.

Rehearing denied.

All the Justices concurred.

[L. A. No. 6547. In Bank.—November 12, 1921.]

JOHN N. KERR, Respondent, v. DAVID C. REED et al.,  
Appellants.

- [1] **VENDOR AND VENDEE—MATURITY OF FINAL PAYMENT—DUTIES OF PARTIES.**—When the final payment comes due under a contract for the sale of land in which time is of the essence of the contract, the obligation to make the payment and the obligation on the part of the vendor to make a deed are dependent and concurrent conditions.
- [2] **ID.—TENDER OF DEED—WAIVER.**—A vendee under a contract of sale may either expressly or by implication waive the tender of a deed by the vendor, or tender may be excused by conduct showing that it would be a vain and useless ceremony.
- [3] **ID.—QUESTION OF FACT—APPEAL.**—Waiver of tender of a deed under a contract of sale is a question of fact, and when supported by sufficient evidence to justify the inference of waiver the finding is binding upon the appellate court.
- [4] **ID.—FAILURE TO TENDER DEED—SUBSEQUENT SALE—RESCISSION—RIGHT OF VENDEE.**—Where both parties under a contract of sale, in which time was made of the essence, allowed the date of final payment to pass without action, and the vendor subsequently sold the land to a third party without putting the vendee in default by a tender of a deed, he thereby breached his obligation, and the vendee was entitled to treat such sale as a rescission of the contract and to sue for a recovery of moneys paid.

APPEAL from a judgment of the Superior Court of San Diego County. T. L. Lewis, Judge. Affirmed.

The facts are stated in the opinion of the court.

M. A. Luce, Robert B. Murphey and Hunsaker, Britt & Cosgrove for Appellants.

Dwight D. Bell for Respondent.

WILBUR, J.—This is an action brought by a vendee of real estate to recover from the vendor installments of the

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4. Right of vendee in contract of sale of real property to recover payments, note, L. R. A. 1917B, 540.

Right of vendee to recover payments upon resale by vendor after vendee's default, note, 35 L. R. A. (N. S.) 532.

purchase price paid to him, amounting to \$5,600, upon the theory that the contract dated December 4, 1912, had been rescinded by mutual consent. The contract price was \$25,000; \$5,000 paid upon the execution of the contract; \$5,000 and a mortgage for \$15,000 for the balance of the purchase price to be paid December 4, 1913, interest at six per cent, payable quarterly. Interest was paid as follows: \$300, March 15, 1913; \$150, June 4, 1913; \$150, July 1, 1913; \$65.63, September 4, 1913; \$69.03, November 10, 1913. The vendee on December 4, 1913, was in default as to the interest, \$165.34, and also had failed to pay the taxes due in November, but in lieu thereof had given a note for \$182.87. Time was made of the essence of the contract by the following clause:

“Time is hereby declared to be of the essence of this contract, and should purchaser fail or neglect to make said deferred payments, or any of them, at the times and in the manner herein provided, then and in that event this receipt and contract shall at once become null and void, and the said parties of the first part shall be at once released from any and all obligations to make any conveyance hereunder, or to convey the property herein described to said purchaser. It being agreed that it is impossible to fix and determine the actual damage arising out of the failure of said purchaser to make said deferred payments, it is hereby agreed that all moneys paid upon the purchase price of said property shall be by the parties of the first part retained and held as and for liquidated damages arising and caused by the failure of the said purchaser to comply with the terms hereof.

“And the parties of the first part, on receiving such payment, at the time and in the manner above mentioned, agree to execute and deliver to the party of the second part, or to his assigns, a good and sufficient deed conveying said property to said party of the second part or his lawful assigns, and to furnish a certificate of title from the Union Title and Trust Company, showing property free and clear of encumbrance from date of November 23rd, 1912.”

Nothing was done on the 4th of December, 1913, by either party. The vendee had been placed in possession under the contract, that is to say, under the arrangement made the rents from the property were collected by an agent and cred-

ited to the vendee on account of the interest due on the contract. Some time after the fourth day of December, 1913, at the direction of the defendant this agent began to credit the rentals to the vendor. [1] It is thoroughly established that when the final payment comes due under a contract in which time is the essence of the contract the obligation to make the payment and the obligation on the part of the vendor to make a deed are dependent and concurrent conditions. (Sec. 1439, Civ. Code; *Boone v. Templeman*, 158 Cal. 290, 297, [139 Am. St. Rep. 126, 110 Pac. 947], and cases cited; *Sausalito etc. Land Co. v. Sausalito Imp. Co.*, 166 Cal. 302, 308, [136 Pac. 57]; *Lemle v. Barry*, 181 Cal. 6, 10, [183 Pac. 148]; *Lemle v. Barry*, 181 Cal. 1, 3, [183 Pac. 150]; *Hoppin v. Munsey*, 185 Cal. 678, [198 Pac. 398].)

On December 4, 1913, the date of the final payment, the vendor was to give the deed and the purchaser to tender the purchase money. Without action on the part of either, neither could claim the other was in default. The plaintiff testified and the court found that he was totally unaware of any intention on the part of the vendor to declare a forfeiture or to consider the contract terminated until July, 1914, when he was notified that the vendor had sold the property. This sale was made June 15, 1914, without any arrangement by which the vendor could subsequently make title to the plaintiff herein, and, consequently, if the contract was then in force as to both parties, the sale constitutes a breach of contract on the part of the vendor which the vendee might take advantage of by rescission and suit to recover money paid on account of purchase price. (*Brimmer v. Salisbury*, 167 Cal. 522, [140 Pac. 30].) The vendor has never tendered the vendee a deed, nor has the purchaser ever tendered the purchase money. The plaintiff does not allege that he was at any time ready, able, and willing to pay the purchase price, and relies wholly upon the implied rescission arising from the sale by the vendor to a third party and plaintiff's subsequent demand for a return of the purchase money theretofore paid by him as a consent thereto.

This case was previously tried and a motion for a nonsuit was granted. An appeal was taken to this court and as-

signed to the district court of appeal, second division, where the judgment was reversed. (*Kerr v. Reed*, 39 Cal. App. 11, [179 Pac. 399].)

Upon the new trial the plaintiff recovered judgment for the full amount paid by him on the contract, less the rental value of the premises during the time he was in possession. The vendor appeals from this judgment. He claims that the respondent waived a formal tender of the deed on December 4, 1913, and, therefore, that such tender was unnecessary to put the vendee in default. (*Hoppin v. Munsey, supra.*) Mr. Swayne, Mr. Fleet, and the defendant testified that the day before the final payment came due, to wit, December 3, 1913, the vendee stated to the vendor that it would be impossible for him to make the payment which was due the next day; that he was "all in" and could not raise the money, and that the vendor thereupon stated that he would give no extension of time and would stand on the contract. The defendant also testified that the plaintiff had made similar statements in September, 1913; that plaintiff then said that he would be unable to meet his payments any more; that he was "all in"; that he had to pay some notes for his father-in-law in Denver, and he could not pay any more. He said he had put in about twenty-five thousand dollars in San Diego and it would all be a loss. This testimony, if believed by the trial court, would undoubtedly be sufficient to justify a finding by that court that the tender of the deed on December 4th was waived, and that the purchaser, being in default, had no right to recover the purchase money theretofore paid by him. (*Hoppin v. Munsey, supra.*) The testimony of the plaintiff, however, conflicted with that of the defendant and his witnesses.

The plaintiff testified that in July, 1913, he was unable to pay the full amount of the three hundred dollars due as interest and that the defendant told him to do the best he could and that he would let the rents apply on the interest as collected; that about November 20, 1913, the payment of five thousand dollars due December 4, 1913, was mentioned by Mr. Fleet, defendant's agent. Plaintiff testified: "I told him I didn't think I would be able to meet it at that time, and he said not to let it worry me, that they would take care of it all right." At that time it was

arranged that the defendant would pay the taxes then due on the premises, which the vendee had contracted to pay, and to accept a written agreement of plaintiff bearing interest in lieu of such payment. Plaintiff testified that no other conversation occurred with either Mr. Fleet, Mr. Swayne or Mr. Reed until December 10, 1913, and that he had not seen any of them between November 20th and December 10th; that on December 10th he asked Mr. Fleet, defendant's agent, for a written statement as to when he might pay the balance due on the contract. To this request Mr. Fleet responded: "Well, don't ask Mr. Reed for any written statement on this. He has never taken anybody's money and he won't take yours." Subsequently plaintiff stated he talked with Mr. Reed, the defendant, who told him not to worry; that it could be arranged some way; that neither the defendant nor Mr. Fleet informed the plaintiff at these conversations that they considered the contract forfeited or that they considered themselves in possession of the property. The plaintiff admitted on cross-examination that on December 4, 1913, he did not have sufficient funds to meet the five thousand dollar payment, but that he did have some money and property from which money could be raised. The plaintiff does not specifically deny the above-mentioned conversations testified to by defendant and the witnesses Swayne and Fleet as having occurred between November 20th and December 4th, except by denying that any conversation occurred between November 20th and December 4th. It is contended by appellant that plaintiff in effect merely denied the date of the conversations and not the conversations themselves. But the court may well have believed that he meant to deny the conversations. If we accept the plaintiff's testimony, it follows that whatever may have been said before the 20th of November, 1913, the parties then regarded the contract as still in force. The plaintiff then gave a new obligation to pay the taxes then due under the contract and requested and received assurance that he would not be pressed for the payment due December 4, 1913.

[2] The tender of the deed was due from the defendant on December 4th. The tender could have been waived by the vendee expressly or by implication or excused by conduct showing that the tender would be a vain and useless

ceremony. (*Hoppin v. Munsey, supra.*) There was no express waiver of the tender of the deed and the implied waiver to be inferred from the conversation of November 20th, testified to by the plaintiff, was, of course, conditioned upon the waiver of payment when due. Hence, if the defendant had tendered his deed on December 4th he might be in a condition to declare a default for the nonpayment of the amount then due, but without such tender it is clear he could not declare such default unless the tender was excused under the law, on the theory that it would have been a useless ceremony. (*Hoppin v. Munsey, supra.*) But here, according to plaintiff's testimony, both parties regarded the contract as still in force, after the plaintiff's statements of his inability to pay, and for that reason made arrangements to pay the taxes, and, according to the plaintiff, on December 10th defendant recognized the contract as still in force. In this state of the evidence the trial court found the fact to be: "That plaintiff never by act, word, or otherwise waived any provision or covenant of, or right under, the contract . . ." While this finding is attacked as not supported by the evidence, the testimony of the plaintiff was sufficient to support the finding, notwithstanding his failure to specifically deny the conversations attributed to him by defendant's witnesses. [3] The question of waiver is a question of fact, and when supported by sufficient evidence to justify the inference of waiver is binding upon this court. [4] In view of this finding and others by the court along the same line, we have the simple situation where both parties to a contract in which time is made the essence thereof allow the date of final payment to pass without action. Under these circumstances neither party can be subsequently placed in default by the other without a tender. (*Lemle v. Barry, supra.*) It follows that the contract was in full force and effect at the time the vendor made the conveyance to a third party and thereby breached his obligation. The plaintiff was justified in treating this as a rescission and upon consenting thereto to sue for a recovery of the money paid by him.

Appellant strongly relies upon the cases of *Glock v. Howard etc. Co.*, 123 Cal. 1, [69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713], and *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 170, [159 Pac. 420], and also upon the



case of *Skookum Oil Co. v. Thomas*, 162 Cal. 539, [123 Pac. 363]. It is sufficient to say that the contract in the case at bar is substantially identical with that involved in the recent cases of *Lemle v. Barry, supra*, and *Hoppin v. Munsey, supra*, and, being controlled by these late cases, if any inference is to be derived from the cases relied upon by the appellant pointing to a different conclusion, a point which we need not decide, those cases are controlled by the more recent decisions of *Lemle v. Barry, supra*, and *Hoppin v. Munsey, supra*.

The judgment is affirmed.

Angellotti, C. J., Shaw, J., and Shurtleff, J., concurred.

Sloane, J., deeming himself disqualified, did not participate.

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[S. F. No. 9908. In Bank.—November 12, 1921.]

JAMES W. ELDER et al., Petitioners, v. H. F. DOSS et al.,  
Respondents.

[1] COUNTIES—FORMATION OF NEW COUNTY—PETITION—COMPLIANCE WITH ACTS OF 1907 AND 1909.—A petition for the organization of a new county out of territory wholly within the territory of an existing county which fails to comply with the requirements of the act of 1907, providing for the formation of new counties (Stats. 1907, p. 275), and also with the requirements of the amendatory act of 1909 (Stats. 1909, p. 194), is insufficient and properly denied.

PROCEEDING on application for a Writ of Mandamus,  
Dismissed.

The facts are stated in the opinion of the court.

Hartley F. Peart, Frank J. Burke and E. J. Dole for  
Petitioners.

G. W. Hoyle, District Attorney, for Respondents.

ANGELLOTTI, C. J.—This is an application for a writ of mandate to compel the board of supervisors of Sonoma

County to appoint a day for the hearing of a petition for the organization of a new county out of territory wholly within the territory of Sonoma County. The petition failed to show that the creation of the new county would not reduce the area of Sonoma County to less than one thousand two hundred square miles, and it is conceded that it would so reduce such area. Both the act of 1907 providing for the formation of new counties (Stats. 1907, p. 275), and the act of 1909 amendatory thereof (Stats. 1909, p. 194), the only statutes on the subject, provided as follows: "Nor shall any new county be formed which shall reduce to less than twelve hundred square miles the area of any existing county from which territory is taken to form such new county." The petition purported to be signed by more than one-half of the qualified electors living within the territory to be comprised in the new county, a sufficient compliance in that respect with the act of 1907, but it did not purport to be signed by sixty-five per cent of such qualified electors, as required by the amending act of 1909, or by not less than fifty per cent of the qualified electors residing in the county, as required by such amending act. For these reasons the board refuses to proceed on the petition, and denied the same.

At the very threshold plaintiffs are met by a condition that, in our opinion, requires a denial of their application. Their claim, in brief, is that the amendatory act of 1909 is void for failure of its title to sufficiently state its scope, with the result that the only act in force is that of 1907; and that the petition being signed by the requisite number of electors as prescribed by that act is sufficient in respect to signatures. With regard to the provision common to the act of 1907 and that of 1909, that no new county shall be formed which shall reduce to less than one thousand two hundred square miles the area of any existing county from which territory is taken to form such new county, the claim is that the provision is violative of our constitution for several reasons, and must be disregarded, leaving the act of 1907 in force without such provision.

It was said in *Los Angeles County v. Orange County*, 97 Cal. 329, 331, [32 Pac. 316]: "Counties are merely local subdivisions of the state, created by the legislature for governmental purposes, and are denominated public corporations for the reason that they are but parts of the machinery em-

ployed in carrying on the political affairs of the state. *The legislature, except as restrained by constitutional limitations, may change their boundaries and extent, consolidate two or more into one, or divide and create new counties out of the territory of one or more previously existing ones*" (italics ours). At the time of this decision, as now, the only constitutional provision on the subject was section 3 of article XI of the constitution, which then simply provided that "no new county shall be established which shall reduce any county to a population of less than eight thousand, nor shall a new county be formed containing a less population than five thousand; nor shall any line thereof pass within five miles of the county seat of any county proposed to be divided . . . ." These were prohibitions pure and simple, and subject only to them the power of the legislature in the matter of the creation of new counties by either general or special law (see *Wheeler v. Herbert*, 152 Cal. 224, 228, [92 Pac. 353]; *Mundell v. Lyons*, 182 Cal. 289, [187 Pac. 950]) was unlimited. In 1894 the constitutional provision was amended by inserting at the beginning of the section the words "The legislature, by general and uniform laws, may provide for the formation of new counties, provided however that," and in 1910 it was further amended by inserting in this clause after the words "may provide for" the words "the alteration of county boundary lines and for," with the result that the section now reads: "The legislature, by general and uniform laws, may provide for the alteration of county boundary lines, and for the formation of new counties, provided, however, that no new county shall be established which shall reduce," etc. By the amendment of 1910 the minimum population of the old county was also fixed at twenty thousand instead of eight thousand, and the minimum population of a new county at eight thousand instead of five thousand matters immaterial here. The effect of these changes was considered in the recent case of *Mundell v. Lyons*, 182 Cal. 289, [187 Pac. 950], and it was substantially held that the provision authorizing the legislature "by general and uniform laws" to provide for the formation of new counties, was designed to prohibit the formation of new counties by the legislature by special act, or provision by the legislature for their formation in any other way than by general and uniform laws. In the language of *Mundell v. Lyons*, *supra*,

"it is at once evident that the section, as it so read, was designed to be prohibitory and a limitation upon the authority of the legislature." It was simply another "constitutional limitation" upon the power of the legislature in the matter of the creation of new counties, which, subject to the prohibitions contained in the section, was still left with full power in such matters. Whether there should be *any* law under which new counties might be formed was left to the legislature. The language in this respect is entirely permissive, being: "The legislature, by general and uniform laws, *may provide*," etc., and clearly the case is not one where the word "may" can be read as "shall" or "must." If, in its wisdom, it concluded that provision for the formation of new counties should be made, it could make it only "by general and uniform laws," and in view of its power in such matters, it seems perfectly clear that in such laws it could prescribe such conditions as it saw fit, in addition to and consistent with the conditions prescribed in the constitutional provision.

In the exercise of the power vested in the legislature, the provision against a reduction in area of the old county to less than one thousand two hundred square miles was inserted in the acts of both 1907 and 1909. Such, in the judgment of the legislature, was deemed an indispensable condition to the creation of a new county from the territory of an old county. We are aware of no authority that would warrant us in holding that the legislature would have enacted these laws in the absence of such a provision, even if we assume for the purposes of this decision that it is violative of certain provisions of our constitution inhibiting special legislation and requiring that all acts of a general nature shall have a uniform operation. It was the judgment of the legislature that no new county should be formed if its formation would have any such effect. [1] If, then, this provision is void, the whole act of 1907 must necessarily be void, and likewise the whole act of 1909. The result, if that is the case, obviously would be that no valid general and uniform law for the formation of new counties has been enacted. Without such a law there can be no proceeding for the formation of a new county, and plaintiff's petition was properly denied by the board of supervisors of Sonoma County. If, on the other hand, the act of 1907 was a valid enactment,

the petition was properly denied, for the reason that the formation of the proposed new county would be in violation of the terms thereof in the respect discussed, as prescribed both in such act and the amendatory act of 1909. In either event, plaintiff's proceeding before the board of supervisors must be held ineffective for any purpose.

Under the circumstances stated, discussion of the objections on constitutional grounds to the provision in these acts prohibiting reduction in area below one thousand two hundred square miles of the county from the territory of which the new county is proposed to be formed, as well as to the amendatory act of 1909, would be futile. We are not to be understood, however, as assenting to the claim that the area provision is invalid, or as expressing any opinion as to the objections made to the amendatory act.

The order to show cause is discharged and the proceeding dismissed.

Shaw, J., Lennon, J., Shurtleff, J., Lawlor, J., Sloan, J., and Wilbur, J., concurred.

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[Sac. No. 3337. In Bank.—November 14, 1921.]

MADALYNNE C. OBENCHAIN, Petitioner, v. THE  
SUPERIOR COURT OF LOS ANGELES COUNTY  
et al., Respondents.

[1] MANDAMUS—DENIAL BY DISTRICT COURT OF APPEAL—REMEDY IN SUPREME COURT.—Where a petition for a writ of mandate is denied by the district court of appeal, the remedy of the petitioner in the supreme court is by way of petition within the sixty days allowed by the constitution for an order vacating the judgment of the district court and directing a rehearing of the case in the supreme court.

APPLICATION for a Writ of Mandamus. Denied.

The facts are stated in the opinion of the court.

Cooper, Collings & Shreve, Charles E. Erbstein and  
Ralph Obenchain for Petitioner.

THE COURT.—[1] The petition for a writ of mandate herein, directed to the superior court of Los Angeles County, to compel said court to dismiss and quash the indictment pending therein against petitioner or to grant her an immediate trial of said cause, is denied upon the ground that the remedy of the petitioner in this court, after denial of her petition for such mandate in the district court of appeal, is by way of petition to this court, within the sixty days allowed by the constitution, for an order vacating the judgment of the district court and directing a rehearing of the case in this court.

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[Sac. No. 3024. In Bank.—November 17, 1921.]

SECRET VALLEY LAND COMPANY (a Corporation),  
Respondent, v. WILLIAM F. PERRY et al., Defendants;  
MARY J. THOMPSON, as Administratrix, etc.,  
Appellant.

- [1] PUBLIC LANDS—TITLE IN UNITED STATES—TAXATION BY STATE.—Land belonging to the United States is not subject to taxation by the state, and a sale of such land for taxes levied thereon before it is listed to the state and before the applicant to purchase the land from the state is in possession is void.
- [2] ID.—CONFLICTING CLAIMANTS—HOLDER OF PRIOR CERTIFICATE—LACHES—STATUTE OF LIMITATIONS.—A claim of title to state land based upon a certificate of purchase issued prior to the listing of the land to the state by the United States is neither barred by laches nor by the provisions of section 343 of the Code of Civil Procedure, as against a claim under a subsequent certificate of purchase issued after the land had been sold to the state under a void tax sale, where the latter merely paid the taxes for several years and neither of the claimants had ever been in possession or made any claim or demand upon the other until the latter commenced an action to quiet title.
- [3] QUIETING TITLE—ADVERSE CLAIM.—One holding the legal title or a paramount claim to the legal title is not called upon to take action against a hostile claim which is not of a nature to ripen into a valid adverse title.
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1. Liability to state taxation of United States property granted or sold by government, but to which government still holds title, note, 11 Ann. Cas. 391.

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**[4] ID.—MERE CLOUD UPON TITLE—CONTINUING CAUSE OF ACTION.—**

An outstanding adverse claim which amounts only to a cloud upon the title is a continuing cause of action and is not barred by lapse of time until the hostile claim is asserted in some manner to jeopardize the superior title, and so long as the claim lies dormant and inactive the owner of the superior title has the privilege of allowing it to stand indefinitely, and each day's assertion of the claim gives a renewed cause of action to quiet title until such action is brought.

APPEAL from a judgment of the Superior Court of Lassen County. H. D. Burroughs, Judge. Reversed.

The facts are stated in the opinion of the court.

Harrison S. Robinson, Harry L. Price, James S. Moore, Jr., and R. W. Macdonald for Appellant.

R. M. Rankin for Respondent.

SLOANE, J.—This appeal involves the question of priority of right between the plaintiff and the defendant Thompson, under conflicting certificates of purchase of land from the state of California.

The appellant's certificate is prior in time and unless avoided or forfeited, establishes an interest superior to that claimed by respondent.

The action was brought to quiet title and the judgment was for plaintiff.

The findings of the trial court upon which this judgment rests are to the effect "that the right, title and interest of said defendant and her predecessors in interest, is barred by her laches and unreasonable delay in asserting their claim to the property affected by this action"; and "that the claim of this defendant is barred by section 343 of the Code of Civil Procedure of the state of California."

If, as contended by appellant, these findings are unsupported by the evidence, judgment should have been for the defendant.

The facts affecting the title to this land, accepting the summarized statement in respondent's brief, are as follows:

"On September 18, 1895, said land was vacant Government land of the United States, and on said date Frank Robert Thompson filed in the office of the Surveyor General



of the State of California an application to purchase said land from the State.

“March 17, 1896, the Surveyor General approved said application of Frank Robert Thompson to purchase the land.

“May 18, 1896, Certificate of purchase Number 13625 issued from the Register of the State Land Office to said applicant.

“February 21, 1898, the land in question was clear listed to the State of California by the United States Government, and included in clear list No. 8, Susanville Land District.

“For the fiscal year 1897, and for five years subsequent thereto, said land was assessed for taxation as the property of Frank Robert Thompson by the County of Lassen.

“On June 27, 1898, as provided by statute, the land was sold for non-payment of taxes levied in 1897 and a Certificate of Sale therefor issued to the State.

“On June 28, 1903, a Tax Deed was made by the Tax Collector of said County to the State as provided by law, and a certified copy thereof filed in the office of said Surveyor General of said State.

“On April 26, 1909, Jessie R. McKay, pursuant to the provisions of Section 3788 of the Political Code, redeemed said land from such Tax Sale and filed a Certificate of redemption thereof, together with her application to purchase the same, in the office of the Surveyor General on May 7, 1909. Her application was thereafter approved and on December 15, 1909, Certificate of purchase Number 17,076 issued to her.

“Prior to the commencement of this action all the principal due the State of California for the purchase of said land under said certificate had been paid, and all the interest thereon, except the sum of \$30.88, which was paid on the 29th day of June, 1918, prior to the trial of this action.

“Each year after the date of said Certificate of Purchase, No. 17076, said lands were assessed to the owner and holder of said Certificate, and the taxes thereon paid as they fell due by said Jessie R. McKay or her grantees.

“This action was commenced July 12, 1917, by the Plaintiff who was then the owner of the said Certificate issued to Jessie R. McKay. Appellant's answer and cross-complaint was filed December 6th, 1918.

“Neither Frank Robert Thompson, nor his heirs or representatives, made any claim to said land or to said certificate of purchase issued to said Thompson prior to 1918, nor did they make any payment to the State of California on account of the principal or interest after the issuance of said certificate of purchase to said Thompson, prior to the 31st day of December, 1918.

“Frank Robert Thompson died March 12, 1913, and on January 11, 1918, Mary J. Thompson was appointed Administratrix of his estate.

“Prior to her appointment as such administratrix she gave notice to the Surveyor General required by Chapter 602 of the Statute of 1917, and on December 31, 1918, she paid the balance of the purchase money, interest and penalties accrued on the said Thompson certificate of purchase during the period of twenty-two years.”

It is not seriously disputed that the clear listing of this property to the state of California as lieu land subsequent to Thompson's application to purchase and the issuance to him of a certificate of purchase May 18, 1896, by the register of the state land office validated and established a preferential right to this property, which entitled him to a patent from the state upon his meeting the subsequent payments according to law.

[1] The subsequent tax sale for taxes levied upon the land in 1897, while title was still in the government of the United States, was void, the land not being subject to taxation by the state. (*Slade v. County of Butte*, 14 Cal. App. 453, [112 Pac. 485]; *Roberts v. Gebhart*, 104 Cal. 67, [37 Pac. 782]; *Allen v. Pedro*, 136 Cal. 1, [68 Pac. 99].) The land had not at that time been listed to the state and Thompson was not even in possession.

The state in due time took a tax deed from the tax collector under this void sale, and thereafter in 1898 respondent's predecessor in interest redeeming the land under this sale, applied for and received a certificate of purchase from the state. If the tax sale had been effective in annulling Thompson's prior certificate of purchase, it may be conceded that respondent's claim of title would be established. But the proceedings under such tax sale were void and were entirely ineffectual to foreclose the rights of Thompson or

to reinvest the state with any power to further dispose of the land.

Neither Thompson nor his personal representative after his death took any further steps to complete title under his certificate of purchase until the year 1918. Neither was any action taken by the state to foreclose his rights for failure to make interest or other payments required by law. In December, 1918, however, in compliance with the requirements of chapter 602 of the Statutes of 1917, Mary J. Thompson, the appellant, as administratrix, paid the balance due on the purchase money, interest, and penalties accrued under such original certificate of purchase.

In the meantime the respondent and its predecessors in interest paid taxes on the property and made interest and installment payments under their certificate of purchase, and at the time this suit was commenced had paid all the purchase money, interest, etc., excepting the sum of \$30.88 which was paid before the trial.

It is to be noted that neither of the claimants was at any time in possession of the land, and prior to the bringing of this suit to quiet title neither had made any claim or demand upon the other.

Under this state of the case it is the finding of the trial court and the contention of the respondent that the Thompson claim represented by appellant is barred by laches and under the provisions of section 343 of the Code of Civil Procedure.

It is not shown, and is not even claimed, that there has been any forfeiture of the Thompson rights as against the state of California by the delay in making payments of the interest, penalties, and balance of the purchase price under his certificate of purchase. Long as the period of delinquency was it worked no forfeiture under the law in the absence of a foreclosure until after the enactment of chapter 602 of the Statutes of 1917; and the final payments above referred to were made in compliance with that statute.

The laches and lapse of time complained of is in failing to protest or take action against the claim to the property evidenced under respondent's certificate of purchase, and in permitting the payment of taxes and other expenditure of money by the respondent and its predecessors.

[2] We are unable to see where any duty rested upon the defendant in this matter. No attack was made upon the Thompson title until this action was begun. There was no adverse possession. There was not even a notice of hostile claim other than might arise from constructive notice of the issuance of the second certificate of purchase, if the facts show such constructive notice. (*Karns v. Olney*, 80 Cal. 90, [13 Am. St. Rep. 101, 22 Pac. 57]; *Crouse-Prouty v. Rogers*, 33 Cal. App. 246, 250, [164 Pac. 901].) The Thompsons had a right to rest on the sufficiency of their own claim. If it was good, the other was a nullity, in the absence of an adverse possession. In any event, there seems to have been no substantial difference in the time during which defendants slept on their rights than characterized the acts of the plaintiff. Neither made any move until this suit to quiet title was filed by plaintiff and it was met by the answer of defendants. Defendants' claim was first in time. Plaintiff was logically the attacking party, and so long as it took no steps to jeopardize defendants' legal rights, there was no need for defendants to act. This is not a case where one party stands secretly by and allows another to expend money upon the other's land with knowledge that it is being done under a mistake of facts. Plaintiff had the same knowledge of the state of this title that defendants had. It should have made investigation or taken legal action earlier, if it wanted assurance against loss. The parties were at arm's-length holding hostile claims of title upon the same land.

The rule as to laches applicable to this case is well stated in *Kypadel Coal & Lumber Co. v. Millard*, 165 Ky. 432, [177 S. W. 270], cited in appellant's opening brief, where it is said: "Both parties are claiming under a record title from a common source, and the only question is superiority. Limitation or lapse of time does not perfect a defective record title in the absence of possession. If the situation of these two parties had continued ten, fifteen, or twenty years longer, and the question should then arise, as now, as to which title of record is superior, a plea of limitation would not avail for either party against the other. Appellants show that they have legally paid taxes on the land. . . . One cannot acquire title to the land of another by paying the taxes on it, nor will a claim of title under a void deed, although recorded, ripen into a fee by lapse of time, nor will

limitations run against the owner of record in favor of a claimant not in possession, nor is it incumbent upon the owner to sue for cancellation of a void deed, or to take steps to remove a cloud upon his title. . . . If he desires to have the cloud removed the law affords a remedy, but he is not compelled to go to that expense, and his failure to do so cannot be considered laches, nor will it operate as an estoppel against him. A mere claim of title even of record, unaccompanied by adverse holding, will not start the statute." (*Liebrand v. Otto*, 56 Cal. 242, 248; *Sanborn v. South Florida Naval Stores Co.*, 75 Fla. 145, [78 South. 428].)

[3] A defendant holding the legal title, or a paramount claim to the legal title, is not called upon to take action against a hostile claim which is not of a nature to ripen into a valid adverse title. (*Farmers' Loan & Trust Co. v. Denver L. & G. R. Co.*, 126 Fed. 46, [60 C. C. A. 588]; *Hays v. Marsh*, 123 Iowa, 81, [98 N. W. 604].)

It would be strange application of the doctrine of laches to hold in this instance that the plaintiff could maintain its attack upon the validity of defendants' claim of title, but that the defendants might not defend by showing the invalidity of plaintiff's claim. Defendants' right of action is no more stale than that of plaintiff. Both arose at the same time. When plaintiff redeemed from the tax sale and obtained a certificate of purchase from the state, a right of action arose in favor of each claimant against the other where neither had a right of action before.

The same argument applies to the plea of the statute of limitations. Plaintiff commences this action nine years after its right of action accrued, and interposes the plea of the statute of limitations against an affirmative defense which arose at the same time.

In any event, this is not a case where the statute of limitations has run against either of the parties. [4] An outstanding adverse claim, which amounts only to a cloud upon the title, is a continuing cause of action, and is not barred by lapse of time, until the hostile claim is asserted in some manner to jeopardize the superior title. So long as the adverse claim lies dormant and inactive the owner of the superior title may not be incommoded by it and has the privilege of allowing it to stand indefinitely. Each day's assertion of such adverse claim gives a renewed cause of action to quiet

title until such action is brought. (*People v. Center*, 66 Cal. 551, 565, [5 Pac. 263, 6 Pac. 481]; *Hyde v. Redding*, 74 Cal. 493, [16 Pac. 380]; *Kypadel Coal & Lumber Co. v. Millard*, *supra*.)

If respondent's contention could be maintained the plaintiff here would be permitted to establish title to this land by reliance upon a four-years' statute of limitations under mere color of title and payment of taxes, whereas it requires five years under such a claim with actual, open, and continuous adverse possession to obtain title by prescription.

The decisions in *Hynes v. M. J. & M. M. Consolidated*, 168 Cal. 651, [144 Pac. 144], and *Aikins v. Kingsbury*, 170 Cal. 674, 675, [151 Pac. 145], relied upon to sustain the plea of laches, do not apply to the facts of this case.

In both of the cases cited the application of the doctrine was sought against the *plaintiffs* for their delay in bringing suit. In the *Hynes* case the defendants were in actual possession of the premises and had, with the knowledge of plaintiff, expended a large sum of money in the successful development of oil wells on the property. In the case of *Aikins v. Kingsbury* the proceeding was by *mandamus* to compel the issuance by the state of a patent to school lands under a certificate of purchase to one Brackett. There had been a judgment of foreclosure against the defendant for default in his payments, and an alleged termination of his rights under an act of the legislature declaring such rights forfeited. As is stated in the opinion: "For more than thirty-eight years no attention was paid to the obligation to pay interest in advance each year to the state. Meanwhile the state had at least attempted foreclosure proceedings and in 1889 had constructively notified all persons interested in the matter of the intention to disregard any asserted rights to the land arising under the Brackett purchase unless the arrears should be paid, yet nothing was done by the holder of the certificate which had been issued to Brackett until after the completion of the sale to Phillips."

The above was an action to compel specific performance, and in such cases it is incumbent upon the plaintiff to have acted with all the diligence the nature of the case will permit. (*Henderson v. Hicks*, 58 Cal. 364; *Hicks v. Lovell*, 64 Cal. 14, [49 Am. Rep. 679, 27 Pac. 942]; *Fowler v. Sutherland*, 68 Cal., 414, 418, [9 Pac. 674].)

The findings of the trial court barring the defense in this action for laches and under the statute of limitations are not supported by the evidence.

The judgment is reversed.

Lennon, J., Wilbur, J., Lawlor, J., Shaw, C. J., and Shurtleff, J., concurred.

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[Crim. No. 2418. In Bank.—November 28, 1921.]

In the Matter of the Application of WILLIAM M. LIGGETT for Writ of Habeas Corpus.

- [1] **INSANE PERSONS—COMMITMENTS—PLACE OF HEARING.**—Under section 2185c of the Political Code, providing that when a person accused of being so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control is brought before the superior court, the judge must by order fix such time and place for the hearing and examination in open court as will give a reasonable opportunity for the production and examination of witnesses, the court may in its discretion designate any place other than that fixed in pursuance of section 142 of the Code of Civil Procedure.
- [2] **ID.—LOSS OF POWER OF SELF-CONTROL—INTEMPERATE USE OF NARCOTICS AND STIMULANTS—TRIAL BY JURY.**—A person accused under section 2185c of the Political Code of being so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control is not entitled to a trial by a jury under section 2174 of such code, since such section applies only to proceedings to adjudge a person insane for commitment as an insane person.
- [3] **ID.—SUFFICIENCY OF AFFIDAVIT.**—An affidavit for the arrest of a person under section 2185c of the Political Code, reciting that the accused has been addicted to the excessive use of intoxicating liquors for more than five years last past and has been continuously intoxicated for six months preceding the making of the affidavit, sufficiently shows that the accused is subject to dipsomania or inebriety to bring him within the purview of the statute and to give the court jurisdiction to proceed with the hearing and examination.

APPLICATION for Writ of Habeas Corpus. Denied.

The facts are stated in the opinion of the court.

E. G. Ryker for Petitioner.



SHAW, C. J.—The petitioner asks for a writ of *habeas corpus* to discharge him from detention in the Agnews State Hospital at Agnew, California, in pursuance of a commitment under section 2185c of the Political Code. He claims that his commitment is unlawful and that the proceedings are void for the reasons about to be mentioned.

The above-named section authorizes the superior court to commit a person to said hospital for care and treatment upon finding that such person “is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control, or is subject to dipsomania or inebriety.”

[1] The first objection of the petitioner to the validity of the proceedings is that the hearing, which was before the superior court of Alameda County, was held in a place in Oakland known as the “Emergency Hospital,” and that there is no legal authority for holding a session of the superior court in any place other than the place designated by law or by an order of the superior court made and published as provided in section 142 of the Code of Civil Procedure, and that no order designating such other place or publication thereof was made in the present case prior to the hearing. The objection is answered by the fact that section 2185c provides that when such accused person is brought before the superior court and the judge has informed him of his rights to make a defense to the charge, “the judge must by order fix such time *and place* for the hearing and examination in open court as will give a reasonable opportunity for the production and examination of witnesses.” The same provision is made by section 2168 of the Political Code with regard to the hearing of a proceeding to commit a person to a hospital for the insane. The two must be presumed to have the same meaning. We think this provision authorizes the superior court to designate any place other than that fixed in pursuance of section 142 aforesaid, in its discretion. It has been customary for the courts to hold such hearings at places other than the courthouse for many years. In the nature of things it must often be more convenient, and sometimes absolutely necessary to do so. Persons to be examined for insanity are sometimes physically unable to be taken to the court-

house without endangering their life or health. It is evident that this provision of the statute was inserted to give the court discretion to direct a hearing to be made so as to give a reasonable opportunity to the person to be examined and to the persons initiating the examination to produce and examine witnesses. It is often necessary to have the patient to some extent under restraint, so that he cannot attack or injure persons present. It would be much more convenient in such cases to have the examination conducted in the place where he is so restrained, or in some other place where similar facilities for restraint are ready for use. Frequently, also, the witnesses for the prosecution of the case are persons who are also confined in such hospital or in attendance there and the order fixing such place for the hearing would be more convenient for everyone else and fully as convenient for the patient to be examined. We think the law is valid and that the court properly followed it in the present case.

[2] Within five days after the examination and commitment the petitioner demanded a trial by a jury, claiming the right to such trial under the provisions of section 2174 of the Political Code. This was denied and the examination and commitment were made by the court without any submission of the matter to a jury. This does not invalidate the order of commitment. Section 2174 applies only to proceedings to adjudge a person insane for commitment as an insane person. The authority for committing one to an asylum for care and treatment who has lost the power of self-control because of his addiction to narcotics or stimulants or is subject to dipsomania or inebriety is found in section 2185c aforesaid. That section does not authorize or require the submission of the matter to a jury. We do not think that the constitutional provision that the right of trial by jury shall be secured to all and remain inviolate (sec. 1, art. I) applies to the present proceeding. The right of trial by jury there referred to is the common-law right of trial by jury in ordinary civil and criminal cases.

[3] The petitioner claims that the affidavit was insufficient to give the court jurisdiction to proceed because it does not state the facts necessary to bring the case within the provisions of the aforesaid section. In this behalf he refers to the case of *Henley v. Superior Court*, 162 Cal. 240,

[121 Pac. 921]. That case holds that an affidavit which merely states that the person named "is so far addicted to the intemperate use of stimulants as to have lost the power of self-control," and states no other facts tending to show the truth of such allegation, is insufficient to give the court jurisdiction to proceed. That was a proceeding in prohibition and the writ was issued in accordance with this conclusion. In the present case the affidavit not only contains the allegation above quoted, but proceeds to allege that Liggett has been addicted to the excessive use of intoxicating liquors for more than five years last past and has been continuously intoxicated for six months preceding the making of the affidavit. Whether the additional facts tend to show the truth of the first allegation or not, it cannot be denied that they do show that the patient to be examined is "subject to dipsomania or inebriety," and this is sufficient to bring him within the purview of the statute and give the court jurisdiction to proceed.

We think the record sufficiently shows, so far as a proceeding in *habeas corpus* is concerned, that a copy of the order fixing the time and place of hearing was actually served upon the petitioner and that he was present at such hearing. We find no sufficient reason for any further consideration of the case.

The petition for a writ of *habeas corpus* is denied.

Shurtleff, J., Wilbur, J., Sloane, J., Richards, J., *pro tem.*, Waste, J., and Lennon, J., concurred.

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[S. F. No. 10054. In Bank.—November 28, 1921.]

HYGIENIC HEALTH FOOD COMPANY (a Corporation),  
Appellant, v. J. E. GRANT, Respondent.

[1] CORPORATIONS—SALARY OF MANAGER—DISQUALIFICATION OF DIRECTOR—ESTOPPEL.—A corporation which has received the benefit of the services of its general manager is estopped from asserting that one of its directors who voted for a resolution providing for an increased salary was not qualified to act as director.

[2] ID.—RIGHT TO INCREASED SALARY—EFFECT OF RESOLUTION.—Where a resolution fixing the salary of the general manager of a cor-

poration was limited in its operation to a period of six months, and thereafter the manager was paid an increased salary for a period of one year, the corporation cannot recover the amount of the increase, where more than three months after the expiration of the six-months period succeeding the passage of a resolution raising the salary the board of directors unanimously passed a resolution declaring that all payments made were fully authorized and that the same salary be continued the remainder of the year.

APPEAL from a judgment of the Superior Court of Alameda County. A. F. St. Sure, Judge. Reversed.

The facts are stated in the opinion of the court.

Welles Whitmore and Cyril C. Lotz for Appellant.

Greene & Sinclair for Respondent.

SHAW, C. J.—The district court of appeal in the above-entitled action rendered an opinion of which the following is a portion:

“This is an appeal by the plaintiff from a judgment against it in an action to recover from the defendant, who was formerly its general manager and member of its board of directors, the sum of \$300 claimed to have been illegally paid by the plaintiff company to the defendant as salary. The defendant had acted as such general manager for some time prior to February 1, 1918, and during that time, according to the testimony, had received a salary of \$125 a month. From that time on, for a period of one year, the defendant was paid \$150 a month. The increase of \$25 a month for one year—\$300—is the subject of this action.

“Payment of \$150 a month to the defendant as salary, for a period of six months, was purported to be authorized by a resolution of the board of directors of the plaintiff company on February 19, 1918.

“The appellant argues two questions: 1. That this resolution providing for payment of \$150 a month was invalid because not carried by the requisite number of votes of directors. 2. That if said resolution was valid, nevertheless, after the expiration of the period of six months covered by said resolution, the defendant was not entitled to \$150

a month for his services while he continued in the employment.

"The action was for money had and received by the defendant for the use of the plaintiff, and the trial court found that the defendant was not indebted to the plaintiff, impliedly finding that the resolution was properly passed and that the salary of defendant was thereby fixed at \$150 a month for six months. This view of the evidence finds some support in the record. It appears that there were five directors of the company. Two of these, admittedly, voted for this resolution. The defendant was present at the meeting, but was disqualified, by reason of his interest in the subject matter, to vote upon this resolution. The other directors were Cyril C. Lotz, who was secretary of the company, and Mr. Lewars, the president of the company, who was chairman of the meeting of the board. It is admitted that Mr. Lotz did not vote for the resolution. The dispute arises over the vote of Mr. Lewars. The original minutes of the meeting of February 19, 1918, where this question of increase of salary first came up for discussion, were written up by the secretary and were offered in evidence. They recite that the motion was duly made and seconded and that 'the motion thereupon was passed, the chair and the secretary not voting.' When these minutes were read at the following meeting of the board of directors, held on May 14, 1918, director Lawson, who had made the original motion, raised the question about the correctness of the minutes. He testified that when the minutes were read and he discovered that they were so written up as to convey the idea that Mr. Lewars had not voted on the resolution, he objected that they did not recite the fact, and asked that the erroneous portion be stricken out, and it was so agreed. Mr. Rogers, another director, also testified that at the meeting of May 14, 1918, director Lawson objected to the statement in the minutes of the previous meeting that 'the chair' had not voted, and such words were accordingly stricken out. It is true the minutes of May 14, 1918, do not recite this objection of Mr. Lawson that the minutes did not state the fact with reference to the vote of Mr. Lewars, but they do show an amendment which eliminates the recital that 'the chair' did not vote, and, to that extent, corroborate the testimony of the two witnesses

just referred to. The portion of said minutes bearing upon this matter is as follows: 'Thereupon the secretary read the minutes of the meeting of the board of directors held on the 19th day of February, 1918, the said meeting being the last one at which the board had convened, director Lawson stated in reference to the clause "the chair and secretary not voting" in line 28 on page 140 hereof, that the secretary of a board of directors was not necessarily a director and that he thought they should be amended to state "director Cyril C. Lotz not voting." They were thereupon approved as so amended.'

"There is also testimony to the effect that the amendment was actually made on the face of the minutes by drawing a line through the entire clause 'the chair and secretary not voting,' and by writing in between the lines the words 'director Cyril C. Lotz not voting.'

"A witness for the defendant testified that she had made about twelve copies of the minutes of this meeting and that the words 'the chair and the secretary not voting' appeared upon the original copy as stricken out by having a line drawn through them; that she had seen these minutes up to within a month of the trial, when she was denied access to them. The testimony of director Lawson is that it was agreed at the meeting where said minutes were read that these words would be stricken out, and he thinks they were stricken out in his presence. The secretary, Mr. Lotz, upon producing the minutes in court, was asked about the line drawn through these words. There had evidently been an unsuccessful attempt made to erase this line. He explained it by saying that there had been some talk of amending the minutes to show that the chair did vote, and during such discussion the line was probably drawn through the words, but the amendment was not made and the line was afterwards erased. This testimony, together with the testimony of Mr. Lewars, merely raised a conflict in the evidence upon this point, and, assuredly, there is sufficient testimony in the record to indicate that the minutes were amended to conform to what was then conceded by all the directors, including Mr. Lewars and Mr. Lotz, to be the fact, i. e., that all directors, except the secretary and the defendant, actually voted for the resolution.

“It is true, as contended by appellant, that a statement in the minutes may be contradicted by other evidence, and that the testimony of Mr. Lewars that he did not vote is competent to contradict a statement to the contrary in the minutes. However, the record presents more than a mere statement in the minutes contradicted by the testimony of Mr. Lewars. It presents evidence that at the following meeting the question of whether or not Mr. Lewars actually voted for the resolution was under discussion. Two witnesses testified that at that time Mr. Lawson challenged the correctness of the statement in the minutes of the previous meeting that ‘the chair’ had not voted for the resolution; that his contention at this time was conceded to be correct, and the minutes were corrected to conform to this acknowledgment of the facts. As so amended, the minutes were then accepted and approved. All directors were present at that meeting, including the two who now contradict by their testimony the recital of the minutes so amended. The conflict is not, therefore, between a recital in the minutes and the testimony of Messrs. Lewars and Lotz, but a conflict between the testimony of these gentlemen at the trial and their admissions and acknowledgments regarding the facts made at an earlier time by the amendment and approval of the minutes. The trial court resolved this conflict in favor of the defendant, and with such determination we may not interfere.

“At the trial an attempt was made by the plaintiff to show that one of the men who was acting as director, and who voted for the resolution, did not actually hold stock in the company in his own name, and, therefore, was not qualified as a director. The court excluded such evidence upon the ground that it was immaterial. If he was not a director *de jure*, he was a director *de facto*, and that is sufficient to bind the plaintiff under the facts shown here. Appellant contends that the doctrine of *de facto* directors applies only between the corporation and innocent third persons and those who have no means of ascertaining the fact. The case of *Rozecrans Gold Mining Co. v. Morey*, 111 Cal. 114, [43 Pac. 585], cited by appellant, does not support this contention. The facts of that case make it entirely inapplicable here. It is there said that the rule



of law for the protection of third parties as to acts of *de facto* officers may well be doubted when applied between the corporation and its own illegally elected officers. In the present case, the question is not between the corporation and an illegally elected officer, as it was in the case of *Rozecrans Gold Mining Co. v. Morey, supra*. This is a case where a corporation has received the benefit of defendant's services under a resolution to compensate him therefor at the rate of \$150.00 a month. The testimony is abundant that the defendant earned all of his salary, if not more. He supervised the mixing of the company's products, and managed all its business, devoting all his time to this work. [1] Having received the benefit of the defendant's services, we think the corporation is estopped to assert now that one of the directors who voted for the resolution providing for payment of defendant's salary was not qualified to act as a director. If it could question this increase in salary upon this ground, it could, upon the same logic, accept the services of all its employees, if they happened to own stock in the corporation, and then refuse to pay any of them because the resolutions authorizing payment were voted upon by a director not actually holding stock in his own name. The plainest principles of estoppel apply equally to both situations. We think the ruling of the trial court excluding this evidence was proper."

The foregoing part of the opinion is approved.

[2] The appellant also contends that the judgment is excessive because of the fact that the resolution above referred to was limited in its operation to a period of six months and that thereafter there was no authority for the payment to the defendant of a salary, or, at all events, of anything in excess of \$125 a month, which was the salary fixed by the by-laws of the corporation. The record, however, shows that on November 12, 1918—more than three months after the expiration of the first six months' period succeeding the passage of the resolution raising the salary to \$150 a month—the board of directors unanimously passed a resolution declaring that all payments of \$150 a month to Grant for his services as general manager made since February 1, 1918, were fully authorized and that the same salary be continued the remainder of the year. This was

full authority for the finding of the court that the defendant had not received any money for the use of the plaintiff on account of the payment to him of the additional \$25 per month for the last six months for the year ending February 1, 1919.

The judgment is affirmed.

Lennon, J., Wilbur, J., Sloane, J., Shurtleff, J., and Richards, J., *pro tem.*, concurred.

Rehearing denied.

All the Justices concurred.

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[Crim. No. 2362. In Bank.—December 1, 1921.]

In the Matter of LAURA CULVER on Habeas Corpus.

- [1] **HABEAS CORPUS—CRIMINAL COMPLAINT IN JUSTICE'S COURT—DETERMINATION OF INSUFFICIENCY.**—In *habeas corpus* proceedings, a court may determine whether or not a complaint in a justice's court in a criminal proceeding states facts sufficient to constitute a public offense.
- [2] **ID.—LIBERALITY OF CONSTRUCTION.**—In determining the sufficiency of a criminal complaint in a justice's court, the greatest liberality of construction must be indulged, and if the complaint states facts which constitute a crime, it will not be held insufficient because other facts are stated which are irrelevant or immaterial or because the law violated by the alleged acts is inaccurately described therein.
- [3] **CRIMINAL LAW — STATUTES — PLEADING AND EVIDENCE.**—A court takes judicial notice of the statutes of the state, and it is unnecessary that their titles or terms be set forth in a criminal complaint.
- [4] **ID.—NATURE OF ACTS CHARGED.**—If the facts stated in a criminal complaint constitute a crime under a particular law, an allegation that they are a violation of another and different law may be disregarded as immaterial.
- [5] **PUBLIC HEALTH — QUARANTINE — POWER OF STATE BOARD.**—By virtue of the broad power conferred by sections 2979 and 2979a of the Political Code and by the Public Health Act (Stats. 1907, p. 893), the state board of health has power to order the quaran-

tine of persons who have come in contact with cases and carriers of contagious diseases.

- [6] **ID.—METHOD OF QUARANTINE.**—Under section 13 of the Public Health Act, as amended in 1911 (Stats. 1907, p. 893; Stats. 1911, p. 565), which provides certain rules governing cases of quarantine, the accepted method of quarantining a person is by confining him in the house in which he is living.
- [7] **ID.—REMOVAL OF QUARANTINE PLACARD — MISDEMEANOR UNDER HEALTH ACT.**—Under section 13 of the Public Health Act, as amended in 1911 (Stats. 1907, p. 893; Stats. 1911, p. 565), which provides certain rules governing cases of quarantine, the removal of a quarantine placard affixed to a place of residence under an order of the state board of health is a misdemeanor.
- [8] **ID.—PLEADING—SUFFICIENCY OF COMPLAINT.**—A complaint charging the removal of a quarantine placard affixed to a place of residence under an order of the state board of health states a public offense under the Public Health Act, regardless of whether it sufficiently states such an offense under section 377a of the Penal Code, as alleged in the complaint.

**PROCEEDINGS** on Habeas Corpus to test the validity of a conviction of a misdemeanor in the Justice's Court of the City of Berkeley. Writ discharged and petitioner remanded.

The facts are stated in the opinion of the court.

Chas. C. Boynton for Petitioner.

Ezra W. Decoto, District Attorney and Frances Wilson Kidd, Deputy District Attorney, for Respondent.

**LENNON, J.**—In the justice's court of the city of Berkeley, county of Alameda, petitioner, Laura Culver, was convicted on a complaint purporting to charge her with the commission of a misdemeanor. She was fined, with the alternative of imprisonment, and, accordingly, upon refusing to pay the fine, was taken into custody and imprisoned by the sheriff of Alameda County. Petitioner subsequently applied to this court for a writ of *habeas corpus* and was released on bail pending a determination of this proceeding.

In his return to the writ the sheriff of Alameda County, the respondent herein, raised several objections to a con-

sideration by this court of the merits of petitioner's application for the writ. However, inasmuch as respondent apparently abandoned reliance upon these preliminary objections at the oral argument and counsel for petitioner and respondent addressed their discussion solely to the merits of the case both at the oral argument and in the briefs filed subsequent to the oral argument, any opposition to a hearing on the merits must be held to have been withdrawn. The first point before this court is, therefore, the contention that the imprisonment of petitioner is unlawful for the reason that the complaint does not charge the commission of any act constituting a criminal offense.

The complaint herein alleges that: The state board of health issued an order directing the quarantine of petitioner's niece, who was a minor child residing at petitioner's home in Berkeley, for the reason that said child had come in contact with cases and carriers of diphtheria. Upon receiving this order of the state board, a police officer of the city of Berkeley affixed a placard on petitioner's premises reading:

"Diphtheria Contact.

"These premises are declared to be in a state of quarantine. All persons are forbidden to leave or enter these premises or to remove any article therefrom without the permission of the Health Officer. Persons removing this notice will be prosecuted."

Petitioner removed the placard from the premises in the presence of the police officer. Such conduct, the complaint charges, constituted a misdemeanor under section 377a of the Penal Code, which provides: "Every person who after notice shall violate, or who, upon the demand of any public health officer, shall refuse or neglect to conform to any rule, order or regulation prescribed by the state board of health respecting the quarantine, or disinfection of persons, animals, things or places shall be guilty of a misdemeanor."

[1] It is true, as petitioner contends, that it is a settled rule in *habeas corpus* proceedings that a court may determine whether or not a complaint in a justice's court in a criminal proceeding states facts sufficient to constitute a public offense. (*Ex parte Kearny*, 55 Cal. 212; *Ex parte Greenall*, 153 Cal. 767, 770, [96 Pac. 804]; *Matter of Ah*

*Sing*, 156 Cal. 349, [104 Pac. 448].) [2] However, the rule is also well established that in determining the sufficiency of such a complaint the greatest liberality of construction must be indulged; if the complaint states facts which constitute a crime, it will not be held insufficient because other facts are stated which are irrelevant or immaterial or because the law violated by the alleged acts is inaccurately described therein. (*Ex parte Williams*, 121 Cal. 328, 330, [53 Pac. 706].) [3] A court takes judicial notice of the statutes of the state, and it is unnecessary that their titles or terms be set forth in the complaint. [4] If the facts stated constitute a crime under a particular law, an allegation in a complaint that the acts in question are a violation of another and different law may be disregarded as immaterial, for it does not alter the nature of the acts charged nor prevent them from constituting a crime. Consequently, it is not essential that the acts alleged to have been committed by petitioner shall have been violative of a "rule, order or regulation prescribed by the state board of health," so as to amount to a misdemeanor under section 377a of the Penal Code. If the tearing down of the placard under the circumstances alleged in the complaint constituted a misdemeanor under any statute of the state, the complaint must be held to charge the commission of a public offense.

[5] There can be no doubt but that, by virtue of the broad power conferred by sections 2979 and 2979a of the Political Code and by the "Public Health Act," the state board of health has power to order the quarantine of persons who have come in contact with cases and carriers of contagious diseases "whenever in the judgment of the said Board such action shall be deemed necessary to protect and preserve the public health."

Section 13 of the so-called "Public Health Act" (Stats. 1907, p. 893; amended, Stats. 1911, pp. 565, 568), provides certain rules governing cases of quarantine. Rule 1 provides, among other things, that, with respect to quarantine, the local health authorities must follow all general and special rules, regulations and orders of the state board of health. Rule 3 reads as follows: "When any building, house, structure, or part thereof, or tent or other place, is quarantined because of a contagious, infectious or communicable disease, said local health boards or chief execu-

tive health officer shall cause to be firmly fastened, in the most conspicuous place upon such house, building, tent or other place, a placard or flag, upon which is printed the name of the disease, in plain and legible letters of at least two and one-half inches in length. This placard or flag must not be removed by any person except the health officer or his deputy and in no case until the premises have been thoroughly disinfected." Section 21 of the said act provides that "Any person violating any of the provisions of this Act . . . shall be guilty of a misdemeanor . . ."

In the instant case, upon receiving an order from the state board of health directing that petitioner's niece be quarantined, the local authorities affixed to the place of residence of petitioner's niece a placard conforming to the provisions of rule 3, above quoted. If the quarantining of these premises was a proper act in pursuance of the order received from the state board of health, then petitioner's act in tearing down the placard was punishable as a misdemeanor under the "Public Health Act."

[6] In this connection petitioner points out the distinction between the quarantine of a *place* and quarantining a *person*. There may be cases in which buildings are quarantined, as distinguished from persons. For instance, where smallpox patients have been removed from a building to a pesthouse the building itself should be quarantined until disinfected, but this does not alter the fact that the ordinary method of quarantining persons is by confining them to their residences and by giving notice to the people outside and inside that there is to be no going out and coming in. It is perfectly apparent from a consideration of the quarantine rules incorporated in the "Public Health Act," section 13 (Stats. 1911, pp. 565, 568), that this statute recognizes that the method of quarantining a person is to quarantine the place in which he lives. Otherwise the quarantine is spoken of as an arrest of the person. Thus, rule 1, requiring quarantining in case of certain contagious diseases and a report thereof to be sent to the secretary of the state board of health, mentions only "cases" of quarantine. Rule 2, likewise, provides that *diseases* "shall be isolated whenever in the opinion of the state board of health, its secretary, or the local board of health or health officer, isolation is necessary to protect the public health." In other words, both

sections provide for the isolation of the *disease*, without distinguishing between the quarantining of place or person. Rule 4 provides for the disinfection of certain parts of the house when persons have been quarantined therein. Rule 8 provides: "Every person subject to quarantine, residing, or being, in a quarantined building, house, structure or tent, shall not go beyond the lot upon which such building, house, structure or tent is situated . . . ." In fact, all the rules, from 1 to 8, inclusive, clearly disclose that the accepted method of quarantining a person is by confining him to the house in which he is living.

Section 2979 of the Political Code provides that the state board may establish and maintain places of quarantine or isolation, but how can it be seriously contended that a mere order directing that a person be quarantined is intended to mean that that person shall be arrested and placed in such an isolation hospital rather than be quarantined by being confined to his residence. Of course, taking possession of the person in the exercise of the powers of the state over health matters would be a method of quarantine, but obviously that cannot be said to be the only method of quarantining a person when the statute clearly indicates that when a place is quarantined the people therein are confined thereto and cannot leave. For instance, in the case at bar, if the state board of health had ordered the quarantining of the place of residence of the petitioner, it would thereby have subjected the proceedings to the very absurdity which petitioner contends for, namely, that the place was quarantined and the person was not. The word "quarantine" is defined in 32 Cyc. 1286 as follows: "Quarantine as a verb" means "to keep persons, when suspected of having contracted or been exposed to an infectious disease, out of a community, or to confine them to a given place therein, and to prevent intercourse between them and the people generally of such community." Now, the order of the state board of health was to quarantine the person of the petitioner's niece. This meant that she must be confined to a given place and kept out of the community. This was obviously accomplished by putting the appropriate notice upon the house which she occupied as required by statute. The allegation that the niece "resided" at the place mentioned may, under the liberal rules of construction above referred



to, be interpreted in connection with the whole complaint as meaning that she was an "occupant" thereof.

[7] It follows that the placard quarantining the premises was affixed in pursuance of the order of the state board of health and that petitioner's act in tearing it down was a misdemeanor under the "Public Health Act."

[8] In view of the fact that the act was a violation of section 13 of the "Public Health Act," it is unnecessary to pass upon the question raised by petitioner concerning the constitutionality of section 377a of the Penal Code.

The writ is discharged and petitioner remanded.

Wilbur, J., Shaw, C. J., and Sloane, J., concurred.

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[SAC. No. 2999. In Bank.—December 2, 1921.]

CHARLES F. PLATNER, Appellant, v. LILLIAN VINCENT, Respondent.

- [1] **APPEAL—JUDGMENT OF DISMISSAL—POINT RAISED BY DEMURRER—FAILURE TO MENTION IN BRIEF.**—Where, on an appeal from a judgment of dismissal entered after demurrer sustained without leave to amend, the respondent fails to mention in her brief the point of defect of parties raised by the demurrer, it will be regarded as abandoned.
- [2] **HUSBAND AND WIFE—GRANT DEED—BREACH OF COVENANT—PLEADING—PARTIES.**—Where a husband and wife execute a deed as joint and several obligors, the wife is severally liable and may be sued alone for a breach of covenant for quiet enjoyment.
- [3] **DEED—BREACH OF CONTRACT OF SEISIN—VENUE.**—An action for damages for breach of a contract of seisin is not an action to try title in the sense that requires the suit to be brought in a court of competent jurisdiction of the state in which the land is situated.
- [4] **ID.—BREACH OF COVENANT FOR QUIET ENJOYMENT.**—In the absence from a deed of a stipulation providing therefor, the question whether an express covenant for quiet enjoyment runs with the land must be determined by the *lex situs* rather than the *lex loci contractus*.
- [5] **ID.—COVENANT RUNNING WITH LAND—PRESUMPTION AS TO LAW OF ANOTHER STATE.**—In an action for breach of a covenant for

quiet enjoyment of land situated in another state, where no statute of such state is pleaded or called to the attention of the court, the presumption is that the law of such state is similar to the law of this state, namely, that such a covenant runs with the land.

- [6] **ID.—BREACH OF COVENANT OF QUIET ENJOYMENT—VENUE.**—While a covenant for quiet enjoyment runs with the land, it is interrupted by and ceases upon a breach thereof, and where the breach occurs while the original grantee still holds the interest originally conveyed to him by the grantor, the claim, assuming that it arises from the fact that the broken covenant runs with the land, becomes a chose in action and transitory and enforceable in any jurisdiction in which the grantor may be found.
- [7] **ID.—ACTION BY ORIGINAL GRANTEE—VENUE.**—The original grantee under a deed executed in this state to land situated in the state of Washington may recover for breach of covenant for quiet enjoyment, irrespective of whether the covenant runs with the land, notwithstanding the laws of Washington declare such a covenant to be an express covenant and hence for all purposes substantially a part of the deed, since such covenant is one of agreement.
- [8] **ID.—ACTION BY ASSIGNEE OF ORIGINAL GRANTEE—VENUE.**—Where an assignee or grantee of the original grantee seeks recovery for a breach of a covenant for quiet enjoyment while he holds the title, a different rule prevails, for in such a case there is no privity of contract between the original grantor and the assignee and the latter's right to enforce the covenant rests upon privity of estate, and, in the absence of a contract providing that the covenant should inure to his benefit, his right for relief for its breach would be dependent upon the covenant running with the land.
- [9] **ID.—CONSTRUCTION OF DEED—LAW CONTROLLING.**—The effect and construction to be given a deed must be determined by the laws of the state in which the lands it conveys are located, irrespective of where it may have been executed or the grantors reside.
- [10] **ID.—DEED TO LAND IN WASHINGTON — CONSTRUCTION OF COVENANTS.**—Covenants in a deed executed in this state to land situated in the state of Washington must be construed and their scope ascertained from and measured by the laws of such state, and the words "bargain, sell and convey" contained in such a deed constitute an express covenant for quiet enjoyment, and recovery for breach may be had as if expressly inserted therein.
- [11] **ID.—INABILITY TO OBTAIN POSSESSION — PARAMOUNT TITLE — BREACH OF COVENANT.**—Failure to obtain possession by reason of a superior title in a third person is a breach of a covenant for quiet enjoyment.

APPEAL from a judgment of the Superior Court of Tehama County. John F. Ellison, Judge. Reversed.

The facts are stated in the opinion of the court.

H. D. Jerrett and James T. Matlock for Appellant.

L. W. Hughes for Respondent.

SHURTLEFF, J.—The amended complaint in this action contains two counts. The first alleges that on June 5, 1916, plaintiff was the owner, entitled to, and in possession of a designated lodging-house in San Francisco, under and by virtue of a certain lease, and on the same day was also the owner of, entitled to, and in possession of the furniture therein. That on said day one C. H. Vincent and the defendant Lillian Vincent made their bargain and sale deed, which is set forth *in haec verba*, conveying certain real property situate in the state of Washington to plaintiff, the operative words of which deed are, "has granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey," etc. It appears from this deed, it not being otherwise alleged, that the Vincents were residents of the county of Tehama, and that the deed was acknowledged by them in the county of Alameda, this state. It is further alleged that the consideration for the deed and the delivery thereof was said lease, and furniture of the value of two thousand five hundred dollars, which lease and furniture were then and there (on June 5, 1916) delivered to said C. H. Vincent and the defendant Lillian Vincent; that said deed was recorded; that C. H. Vincent is dead, and that the defendant Lillian Vincent is the only grantor named in said deed now living; that plaintiff, on or about the twentieth day of May, 1917, discovered for the first time that the title so conveyed to him was defective, and did, upon or about said last-mentioned date, notify the defendant that said title was defective, and then and there and at divers times thereafter until on or about the twenty-fourth day of February, 1918, made demand on defendant "for a settlement."

It is also alleged that section 8748 of Remington and Ballinger's Codes of 1915, Laws of the state of Washington,

provides as follows: That every grant, bargain, and sale deed for the conveyance of land in the state of Washington containing in substance and form the words "bargain, sell and convey . . . shall convey to the grantee, his heirs or other legal representatives, an estate of inheritance in fee simple, and shall be adjudged an *express* covenant to the grantee, his heirs or other legal representatives," that the "grantor was seized of an indefeasible estate in fee simple, free from encumbrance, done or suffered from the grantor, except the rents and services that may be reserved, as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed." That by the words "grant, bargain, sell and convey," as contained in said deed, the Vincents covenanted to the plaintiff, his heirs and legal representatives, that they (Vincents) were seized of an indefeasible estate in fee simple, free from encumbrance, done or suffered from the grantor, except the rents and services that may be reserved.

"That at the time of the execution and delivery of the said deed, the said C. H. Vincent, and Lillian Vincent, the defendant herein, were not, nor were they or either of them the true, lawful, or rightful owners or owner, nor were they or either of them lawfully seized in their own right of a good and indefeasible estate of inheritance in fee simple, nor had they or either of them good right, full power, or lawful authority to grant, bargain, sell or convey the same in the manner and form, as in said deed pretended and adopted, or in any manner."

The second count is similar to the first, with the exception that it omits the allegations which are in effect but a construction of the statute just quoted, and the negative allegations that the Vincents were not the owners, nor lawfully seized in fee simple, nor had the right to convey, in the manner and form adopted in said deed, the property in it described, and, in addition, alleges, "that by the words 'grant, bargain, sell and convey,' as contained in said deed, the grantor [defendant] covenanted to the grantee, his heirs and legal representatives, to wit, for quiet enjoyment against the grantor [defendant], her heirs and assigns, unless limited by express words (and there were none) contained in said deed. That the plaintiff has not been per-

mitted at any time to peaceably occupy or enjoy said premises under the said deed, or indenture, mentioned and hereby (thereby) intended to be conveyed; nor has he been permitted to have or receive the rents, issues, and profits thereof, but, on the contrary, on the 5th day of June, 1916, one Estelle E. Cooke, at the time of making said deed, or indenture, had, and ever since has continued to have, lawful right to the premises [Lot 8] as described in said deed, . . . and J. R. Haight and Floy Haight, his wife, had and ever since they continued to have, lawful right to the premises [Lot 1] as described in said deed," and they and each of them "ousted plaintiff therefrom, and still lawfully hold him out of the same." Then follow an allegation of damages, and a prayer for judgment in the amount claimed.

To this amended complaint the defendant demurred upon the following grounds, namely: That the court had no jurisdiction of the subject of the action, nor of the subject of the first or second alleged cause of action, because each of them related to "the question of the title and possession" of real property situate in the state of Washington, "and that the judgment prayed for . . . requires a determination of such question." That the complaint as a whole, and each count thereof, fails to state a cause of action. That there is a defect of parties defendant in the omission to join the heirs of C. H. Vincent, deceased; that the first count is ambiguous and for the same reasons uncertain and unintelligible in that "no facts are alleged therein showing that the defendant was not the owner and seized of a fee-simple title and had a good right, full power and lawful authority to bargain, sell and convey the lands therein described." That the second cause of action is ambiguous and also for the same reasons uncertain and unintelligible in that "it does not appear by what right, or claim of right, or in what manner Estelle E. Cooke or J. R. Haight and Floy Haight ousted plaintiff from the premises therein described, or interfered with plaintiff's quiet enjoyment of same."

The demurrer was sustained without leave to amend; whereupon a judgment of dismissal was entered, and it is from this judgment that plaintiff prosecutes this appeal.

[1, 2] Respondent in her brief does not mention the point of defect of parties raised by the demurrer, hence it will be regarded as abandoned, but we find no merit in it, for

it appears from the amended complaint that the defendant and her husband executed the deed in question as joint and several obligors, from which it follows that defendant was severally liable and could be sued alone. (*Holzheier v. Hayes*, 133 Cal. 456, [65 Pac. 968].)

[3] The action sounds in damages, and if for any reason it becomes essential to investigate the title of the land described in the deed, such investigation is an incident to the main inquiry or complaint, which is not one to try title in the sense that requires the suit to be brought in a court of competent jurisdiction of the state in which the land is situate. As declared by the supreme court of Illinois (*Hayes v. O'Brien*, 149 Ill. 403, [23 L. R. A. 555, 37 N. E. 73]), and with which we agree, "Where the relief sought does not require the court to deal directly with the estate itself, the proceeding does not affect real estate, . . . the Court having the parties in interest all before it, may proceed, although the land to which the controversy relates may lie without the jurisdiction of the Court."

Respondent does not seriously contest the soundness of the last stated propositions so far as they are applicable to the first cause of action pleaded in the amended complaint, because it is grounded upon an alleged breach of a contract of seisin, which is admittedly a personal covenant and does not run with the land, and may be enforced wherever the covenantor may be found, but claims they do not apply to the second cause of action, which charges a breach of a covenant for quiet enjoyment, which covenant respondent affirms runs with the land, and for that reason an action for its breach can alone be brought in the proper court of the state wherein the land to which it relates is situate.

[4] In the absence from the deed of a stipulation providing therefor, the question, whether an express covenant for quiet enjoyment runs with the land, must, in our opinion, be determined by the *lex situs* rather than the *lex loci contractus*; to hold otherwise would not only give rise to possible irreconcilable confusion touching such a covenant in the state in which the land affected thereby is situate, but might be tantamount to reading into the statutes of such state a conflicting law of a sister state, which cannot be done. If, however, there are no statutes or judicial decisions in the state wherein the land is located, determining

the question, and none have been called to our attention in the instant case (unless the statute just quoted accomplishes that result, which we do not decide, but, if it does, it would merely confirm what follows), it must be assumed that in the state of Washington a covenant for quiet enjoyment runs with the land, for in the absence of a statute or agreement between the parties negating such transmission, such covenants "run with land in all jurisdictions." (11 Cyc., p. 1088.) [5] Moreover, no statute of Washington upon the subject having been pleaded or called to our attention, the presumption is that the law of that state upon the subject is similar to our own, namely, that such a covenant runs with the land (Civ. Code, sec. 1464). [6] But while it is true that the covenant for quiet enjoyment runs with the land, it is interrupted by and ceases upon a breach thereof (11 Cyc., p. 1088; 15 C. J. 1248); and where, as here, the breach occurs while the original grantee still holds the interest originally conveyed to him by the grantor, the claim, assuming that it arises from the fact that the broken covenant runs with the land, becomes a *chose in action* and transitory and enforceable in any jurisdiction in which the grantor may be found (*Roberts v. Dunsmuir*, 75 Cal. 203, [16 Pac. 782]), from which it follows that in this instance the superior court of the county of Tehama also had jurisdiction of the cause of action pleaded in the second count of the amended complaint. [7] But we think such jurisdiction must be sustained for another and stronger reason. While it is true that each of plaintiff's two alleged causes of action respectively spring from a breach of a covenant, which the laws of Washington declare to be express and hence, for all purposes, substantially part of the deed delivered to him by the Vincents; it is likewise true that the enforcement of neither of them is dependent upon the question as to whether it runs with land. In our opinion the cause of action of the original grantee, and such is the plaintiff, is upon the deed—the contract—and if plaintiff establishes the allegations of his complaint, he should recover, irrespective of whether the covenants involved run with the land. As to the grantee, each covenant is one of agreement and not of some law declaring that it runs with the land. It is fallacious to contend that an express covenant for quiet enjoyment, such as the one involved here is de-



clared to be by the laws of Washington, could not be enforced by the grantee of the deed unless under the laws of the state wherein enforcement is sought it runs with the land. [8] Quite a different rule would prevail where an assignee or grantee of the original grantee seeks recovery for an alleged breach occurring while he held the title; in such a case there would be no privity of contract between the original grantor and the assignee, and hence the latter's right to enforce the covenant would rest upon privity of estate, and, in the absence of a contract providing that the covenant should inure to his benefit, his right for relief for its breach would be dependent upon the covenant running with the land. The early case of *Lienow v. Ellis*, 6 Mass. 331, upholds these views. It was an action by the assignee of the grantee upon a covenant, broken by the grantor, that the land conveyed by the deed was free of encumbrances. Chief Justice Parsons, speaking for the court, said: "When the action of covenant is founded on privity of contract between the parties, their executors or administrators, it is transitory, and may be used as a transitory action; but when it is founded on privity of estate, the action is then local, and must be sued in the county where the land lies. In the case before us, if the plaintiff can maintain an action of covenant upon the covenant on which he declares, he must maintain it as assignee of *Bartlet*, by virtue of his conveyance of the land; and his privity is a privity of estate, and not of contract."

Having determined, therefore, that the defendant's objection to the jurisdiction cannot be sustained, we pass to the discussion of her contention that neither count of the amended complaint states a cause of action.

All agree that the solution of this question depends upon the nature and extent of the covenants, if any, arising from the presence in the deed executed by the Vincents of the words "granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey," which involves the further inquiry, whether the laws of California, where the deed was executed and the grantors resided, or the laws of Washington, where the land is situate, govern and are controlling in solving the problem. A determination in favor of the state of location of the land practically disposes of the proposition, because it then becomes a ques-

tion of interpretation and application of the law of Washington, which, fortunately, is free from difficulty.

[9] We are satisfied that upon the weight of authority, as well as upon reason, the effect and construction to be given a deed must be determined by the laws of the state in which the lands it conveys are located, irrespective of where it may have been executed, or the grantors reside.

In *McGoon v. Scales*, 9 Wall. (76 U. S.) 23, 27, [19 L. Ed. 545, see, also, Rose's U. S. Notes], it is said: "It is a principle too firmly established to admit of dispute at this day, that to the law of the state in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances." And this is true, wherever they may be made.

In *Thomson v. Kyle*, 39 Fla. 582, [63 Am. St. Rep. 193, 23 South. 12], the court uses the following language: "It is . . . almost universally held that so far as real estate or immovable property is concerned, we must look to the laws of the state where it is situated for the rules which govern its descent, alienation and transfer, and for the construction, validity and effect of conveyances thereof."

In *Dalton v. Taliaferro*, 101 Ill. App. 592, 596, it is said: "We are of opinion that the meaning and validity of the words of grant, and of the words supposed to create covenants running with the land, must stand or fall together and therefore must be governed by the same law. If a deed of land in Illinois be executed in Maine or Germany it would be unreasonable to say that while its sufficiency to transfer title must depend alone upon the laws of Illinois, yet we must resort to the laws of Maine or Germany to ascertain the existence and construction of covenants which are inseparable from the land, are annexed to the estate granted, can pass only with the grant of the land, and depend for their validity upon privity of estate between covenantor and covenantee. We therefore conclude that in a deed of conveyance of real estate, covenants running with the land are to be controlled and construed solely by the law of the state where the land is situated."

[10] It is our opinion that the covenants upon which the amended complaint is predicated must be construed and their scope ascertained from, and measured by, the law of

Washington, which, so far as applicable, is, to repeat, as follows: That the words "bargain, sell and convey" shall be adjudged an express covenant "to the grantee, his heirs or other legal representatives," that he, the grantor, "was seized of an indefeasible estate in fee simple, free from encumbrances, done, or suffered from the grantor . . . as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed, and the grantee . . . and assigns, may, in any action, recover for breaches, as if such covenants were expressly inserted." It will be noted that the statute in plain terms declares that the covenants in and by it provided shall be express as distinguished from implied, which, in substance, reads them into the deed and makes them part thereof as completely and effectively as they would be were they in terms written therein, from which it follows that the respondent, by the execution of the deed set out in the amended complaint, expressly stipulated that she was seized of the property in it described in fee simple, free from encumbrances, and for the quiet enjoyment thereof by the appellant. Respondent further contends that the second count of the amended complaint, charging a breach of the covenant for quiet enjoyment, not only fails to state a cause of action, but is uncertain and ambiguous and is a statement of conclusions of law. Its material parts have already been stated, but we will repeat them: "That the plaintiff has not been permitted at any time to peaceably occupy or enjoy said premises under the said deed, or indenture, . . . nor . . . permitted to have or receive the rents, issues, and profits thereof, but, on the contrary, . . . one Estelle E. Cooke, at the time of making said deed, or indenture, had, and ever since has continued to have, lawful right to the premises [lot 8] as described in said deed, or indenture, . . . and J. R. Haight and Floy Haight, his wife, had and ever since they continued to have, lawful right to the premises as described in said deed, or indenture, [lot 1], . . . and said Estelle E. Cooke and said J. R. Haight and Floy Haight and each of them ousted the plaintiff therefrom, and still lawfully hold him out of the same." We think this alleges such an eviction as will, if proven, constitute a breach of the covenant. It is well

settled that eviction need not be by actual dispossession. (*McGary v. Hastings*, 39 Cal. 360, [2 Am. Rep. 456].) In this case the court said: "The true rule deducible from the recent cases is, that the covenant [for quiet enjoyment] is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title. . . . It is enough that the true owner asserts his title and demands the possession. If it is his right to have possession, it certainly is the duty of the covenantee to surrender it to him. The covenant is for quiet possession, and against a rightful eviction. . . . Although there must be an eviction, it is not necessary that there should be an actual dispossession of the grantee." Mr. Justice Shaw, now chief justice, speaking for the court, reaffirms this principle in *McCormick v. Marcy*, 165 Cal. 386, [132 Pac. 449], in these words: "There is no breach of the covenant for quiet and peaceable possession of land until there has been an eviction by the true owner, or an assertion by him of his paramount right in such a manner that the holder through the covenantor is compelled to yield possession or buy the outstanding superior title." (Citing cases.)

[11] If the assertion of the paramount title is such that the grantee cannot avoid yielding to it, or by reason of such assertion is unable to secure possession, there is an eviction as complete as would attend removal from the land by force. Failure to obtain possession by reason of a superior title in a third person is, according to the weight of authority, a breach within the meaning of the covenant. (11 Cyc. 1120; *Playter v. Cunningham*, 21 Cal. 229.)

From what precedes, it follows that the court erred in sustaining the demurrer, and that the judgment must be and it is reversed, and the cause remanded with instructions to the lower court to overrule the demurrer and to grant the defendant a reasonable time within which to answer the amended complaint.

Sloane, J., Shaw, C. J., Lennon, J., Wilbur, J., Waste, J., and Richards, J., *pro tem.*, concurred.

[S. F. No. 9573. In Bank.—December 2, 1921.]

In the Matter of the Estate of CATHERINE ROSS, Deceased. KATHERINE H. NICHOLSON et al., Appellants; JAMES R. CARRICK, as Administrator, etc., et al., Respondents.

- [1] **ESTATES OF DECEASED PERSONS — SUCCESSION — CHILDREN OF DECEASED SISTER—CONSTRUCTION OF CODE.**—The separate property of a widow dying intestate who leaves neither issue, father, mother, brother, nor sister descends to the children of a deceased sister as next of kin under subdivision 5 of section 1386 of the Civil Code, to the exclusion of grandchildren of another deceased sister, since subdivision 3 of such section giving right of representation only applies where the deceased leaves a surviving brother or sister.
- [2] **ID.—COMMUNITY PROPERTY—VESTING OF INTERESTS OF DECEASED SPOUSES.**—Where a widow dies intestate leaving property which was the community property of herself and her predeceased husband, the interests of the heirs of the deceased spouses vest independently of each other under subdivision 8 of section 1386 of the Civil Code, and the heirs of the predeceased husband are entitled to the one-half without regard to whether the other half vests in a father, mother, brothers, or sisters of the widow.
- [3] **ID.—CHILDREN OF DECEASED BROTHERS AND SISTERS—RIGHT OF SUCCESSION TO COMMUNITY PROPERTY—CONSTRUCTION OF CODE.**—Under subdivision 8 of section 1386 of the Civil Code, there need be no brother or sister surviving in order that the descendants of deceased brothers and sisters may inherit the one-half of the community property of a deceased spouse, who left neither issue nor parents.
- [4] **ID.—PETITION FOR PARTIAL DISTRIBUTION — OUTSTANDING UNALLOWED CLAIM — SUFFICIENCY OF PETITION.**—A petition for partial distribution presented in accordance with the terms of section 1663 of the Code of Civil Procedure, added in 1917, is not insufficient, because it shows an outstanding claim not allowed, where it appears that sufficient property has been set aside to cover it, since it is not a requisite that all claims shall have been allowed or disallowed, but only that the court satisfy itself that no injury can result from distribution.
- [5] **ID.—DETERMINATION OF HEIRSHIP — COMPLIANCE WITH SECTION 1664, CODE OF CIVIL PROCEDURE.**—A petition for partial distribution under section 1663 of the Code of Civil Procedure is not insufficient because of failure to comply with section 1664, relative to the determination of heirship.

**[6] ID.—PAYMENT OF INHERITANCE TAXES—SUFFICIENCY OF ORDER.—**

An order for partial distribution directing that out of the distributed properties there shall be deducted and paid the inheritance taxes due from each of the distributees, sufficiently satisfies the requirements of section 1669 of the Code of Civil Procedure.

**[7] ID.—EVIDENCE—PEDIGREE—CONSTRUCTION OF CODE.—**

The provisions of sections 1852 and subdivision 4 of section 1870 of the Code of Civil Procedure do not prescribe the sole method by which pedigree must be proved, and do not exclude testimony on that subject by one having primary knowledge of the facts and who is competent to testify.

**[8] ID.—FINDINGS—HEIRSHIP.—**

In a proceeding for partial distribution, a general finding that all the allegations of the petition are true is controlled by a special finding that certain named persons are the heirs.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco granting a petition for partial distribution. Thomas F. Graham, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

George D. Collins, Jr., for Appellants.

T. G. Crothers, Wm. M. Abbott, Wm. M. Cannon, Kingsley Cannon and I. M. Golden for Respondents.

**LAWLOR, J.**—This is an appeal by certain relatives of Catherine Ross, deceased, from an order granting a petition by the administrator for a partial distribution of the estate of the said Catherine Ross.

Catherine Ross died intestate March 22, 1916, leaving an estate amounting to upward of fifty thousand dollars. At her death she left neither issue nor surviving father, mother, brother, or sister. She did leave surviving her six nephews and nieces, the children of a deceased sister, Elizabeth H. Donohue, and thirteen grandnephews, grandnieces, great-grandnephews, and great-grandnieces, descendants of another deceased sister, Bridget H. Quinn. At the time of her death there were living also two sisters of John Ross, her predeceased husband, and certain descendants of a de-

ceased brother and three deceased sisters of the said John Ross.

The estate of Catherine Ross consisted partly of her separate property and partly of property alleged to have been community property of herself and her deceased husband. The community property came to her through a decree of distribution of the estate of John Ross. James R. Carrick, the petitioner and one of the respondents herein, and a relative of John Ross, and Katherine H. Nicholson, one of the appellants and a relative of Catherine Ross, were appointed and qualified as administrator and administratrix, respectively, of the estate of Catherine Ross.

The petition for partial distribution was filed October 23, 1919, by James R. Carrick, as administrator of the estate. It alleged that notice to creditors had been duly given; that the time within which claims against the estate might be presented had passed; that all claims which had been presented had been paid save one for \$2,442.40, which had been rejected and for the establishment of which an action was at that time being prosecuted; that an inventory of the estate had been filed, and that the estate was not in a condition to be finally distributed. Then followed a recital of the items of the estate and a list of the surviving relatives of John and Catherine Ross. It further stated: "That it has not been determined what inheritance tax is due to the state of California out of said estate and a determination of that matter cannot be made until this court determines what part of the properties of said estate was the separate properties of said Catherine Ross, deceased, and what part of said properties was the community property of said deceased and her predeceased spouse, John Ross." Petitioner's prayer was that the court ascertain and determine the rights of all persons interested in or claiming a portion of the estate, and the proportion to which each was entitled, and that petitioner have such other relief as might be proper. A demurrer was interposed on behalf of Katherine H. Nicholson on the ground that the petition did not state facts sufficient to entitle James R. Carrick to a partial distribution of the estate, which was overruled. Thereupon she filed an answer to the petition, wherein she alleged that all the property was the separate property of Catherine Ross; that Catherine



Ross died testate, and that certain named persons were her only beneficiaries; that the only heirs of Catherine Ross were certain named persons who were the descendants of her two predeceased sisters. The answer further denied all the allegations of the petition.

The court found that all the allegations of the petition were true and those of the answer were untrue; that certain designated property in the estate came to Catherine Ross by decree of distribution from the estate of John Ross, which property was community property; that certain other designated property was her separate property, and that certain named persons were the relatives of John Ross and Catherine Ross. As conclusions of law the court found: "That all of the community property of said deceased . . . was succeeded to at the death of said Catherine Ross, deceased, and should be distributed, on final or partial distribution, in the following manner: One-half ( $\frac{1}{2}$ ) thereof to the said sisters of the said John Ross, deceased, and to the said descendants of the said deceased brother and sisters of said John Ross, deceased, by right of representation, their heirs, administrators or assigns, and one-half ( $\frac{1}{2}$ ) thereof to the said next of kin of said Catherine Ross, deceased, to wit: to the said children of said Elizabeth H. Donohue, deceased, their heirs, administrators or assigns." The conclusion of law was to the effect that the separate property should be distributed to the heirs of Catherine Ross, namely, to the children of Elizabeth H. Donohue.

A portion of the estate amounting to twenty-eight thousand dollars was ordered distributed in accordance with the findings of the court. From this order one grandnephew and four grandnieces of Catherine Ross take this appeal. They are grandchildren of Bridget H. Quinn, one of the deceased sisters of Catherine Ross, whose descendants by the terms of the order of distribution are not entitled to share in the estate.

[1] 1. In considering the distribution of the estate we shall first dispose of the question of the separate property. In this connection respondents assert that "these nieces and nephews are 'the next of kin' of Catherine Ross, and the facts of this case bring it precisely within the provisions of subdivision 5 of section 1386 [of the Civil Code], which provides that: 'If the decedent leaves neither issue,

husband, wife, father, mother, brother, nor sister, the estate must go to *the next of kin in equal degree*''; that ''It is well established that, under the circumstances of this case, subdivision 3 has no application because no brother or sister of deceased survived her.'' Subdivision 3 of section 1386 is as follows: ''If there is neither issue, husband, wife, father nor mother then in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister, by right of representation.'' Respondents further state: ''If there be no brother or sister of deceased living at the time of death, then the succession is not governed by subdivision 3, but is controlled by subdivision 5, which specifically provides for that precise case.''

Appellants contend that ''subdivisions 2, 3, and 4, so far as they relate to inheritance by children and grandchildren of a deceased brother or sister, were all adopted at the same time and as amendments to the pre-existing statute, for the sole purpose of overturning the doctrine of the *Estate of Ingram*, 78 Cal. 586, [12 Am. St. Rep. 80, 21 Pac. 435], on which doctrine rests entirely the ruling in the *Estate of Ellen Nigro*, 172 Cal. 474, [156 Pac. 1019], relied upon by respondents to sustain the decree we have appealed from. . . . Of course if the deceased never had a brother or sister there could be no child or grandchild of a deceased brother or sister. . . . Subdivision 5 makes no provision whatever for vesting the inheritance in a brother or sister of the decedent and hence the absence therein of any reference to the children or grandchildren of a deceased brother or sister. The entire subject of inheritance by the brothers and sisters and by the children or grandchildren of a deceased brother or sister is manifestly left by subdivision 5 to subdivisions 2 and 3 of section 1386.'' Appellants further assert: ''By statutory enactment in 1905, and reaffirmed in 1907, the legislature amended sections 2, 3 and 4 of section 1386 of the Civil Code by granting the right of inheritance to children and grandchildren of a deceased brother or sister, in equal shares and by right of representation, irrespective of whether the decedent left surviving a brother or sister. The purpose of this statutory amendment was to abolish the interpretation of the law as given by the supreme court in *Estate of Ingram*, 78 Cal. 586, [12 Am.

St. Rep. 80, 21 Pac. 435]. This fact is pointed out by the court in *Estate of Jepson*, 174 Cal. 684, [164 Pac. 1].'' Respondents further claim that ''The *Estate of Jepson* is a clear holding to the effect that where particular conditions or facts are provided for by a particular subdivision or clause, that particular subdivision or clause must govern. The particular facts existing in the case at bar are specifically provided for by subdivision 5. The *Estate of Jepson* is clearly inapplicable and the Nigro case is undoubtedly apposite and controlling.''

The position of appellants is untenable. *Estate of Jepson*, *supra*, relied on by them, was decided on the authority of subdivision 2, there having been in that case a spouse and several children of predeceased brothers and sisters who survived the decedent. That case held that the amendments to subdivision 2, adopted in 1905, altered the meaning of that subdivision, and overruled *Estate of Ingram*, 78 Cal. 586; [12 Am. St. Rep. 80, 21 Pac. 435]; *Estate of Carmody*, 88 Cal. 616, [26 Pac. 373], and *Estate of Nigro*, 149 Cal. 702, [87 Pac. 384]. These cases had held that, under subdivision 2, the children of deceased brothers and sisters could not inherit from the decedent unless the latter left surviving a brother or sister. *Estate of Jepson*, *supra*, held that under subdivision 2, as it was amended, the survival of a brother or sister was not necessary in order that children of a deceased brother or sister should inherit.

In *Estate of (Ellen) Nigro*, *supra*, the decedent left neither husband, father, mother, brother, nor sister. The only relatives claiming as heirs were the children and grandchildren of a deceased brother and two deceased sisters. It was claimed the case fell within the provisions of subdivision 3 of section 1386. The court said: ''The rights of the parties here are governed by subdivision 5 of said section. That subdivision is as follows: '5. If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that, when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.'

“This subdivision applies, as its language shows, to cases where the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister surviving. This is the condition here presented. . . . Under its terms, therefore, the only persons in equal degree of kindred to Ellen Nigro who could inherit from her, were the surviving children of the deceased brother and sisters. The grandchildren of such deceased brother and sisters were not in equal degree with such surviving children.” This case was not overruled by *Estate of Jepson, supra*, as appellants claim, for there was no contention in *Estate of Jepson, supra*, that the facts were the same as in *Estate of Ellen Nigro, supra*, and in *Estate of Jepson, supra*, it was declared: “*Estate of Nigro*, 172 Cal. 474, [156 Pac. 1019], contains nothing in opposition to what has been here said. In the *Estate of Nigro* this court simply laid down the unimpeachable proposition that children and grandchildren of a deceased brother or sister were not grouped in the law as forming together one class but as forming two distinct classes, so that grandchildren were entitled to the inheritance only in the event that there were no living children.” In the case at bar, as pointed out, the deceased left neither husband, father, mother, brother, nor sister, and did leave children and grandchildren of deceased sisters. It is, therefore, similar to *Estate of Ellen Nigro, supra*, and is such a case as is contemplated by subdivision 5.

Appellants also claim that even if the case at bar does fall within the provisions of subdivision 5, still the amendments to subdivisions 2 and 4 should be read into subdivision 5, and the children and grandchildren of the deceased sisters be allowed to inherit the property. That this is not the case is shown by the statement in *Estate of Ellen Nigro, supra*, that “these amendments obviously have no bearing whatever on the rule of interpretation here involved. They do not change the effect of the section [1386] as applied to the facts of this case.”

There is no question but that the distributees of the separate property named in the order of distribution are the next of kin of Catherine Ross, they being the children of a deceased sister. As such they are entitled to the property by virtue of subdivision 5 of section 1386. It follows that

the order of distribution of the separate property conformed to the statutory provision.

2. Touching the distribution of the community property, appellants make the contention that "subdivision 8 of section 1386 of the Civil Code has no application, for in the first place that provision is a constituent part of the statute of succession, and is, of course, confined to estate not disposed of by will; and as all the property of the community estate that Mrs. Ross, the decedent, received, other than as surviving wife and pursuant to section 1402 of the Civil Code, came to her under the will of her predeceased husband, it is not within the statute of succession, to wit: section 1386 of the Civil Code." Respondents, on the other hand, maintain that "It is utterly immaterial whether one-half of the community property vested in Catherine Ross by operation of law or under the terms of the decree in the husband's estate. Under the express language of section 1386 of the Civil Code, subdivision 8, the test is: 'What is common property of such decedent and his or her deceased spouse while such spouse was living?'" In *Estate of Davidson*, 21 Cal. App. 118, 122, [131 Pac. 67, 69], it was said: "Subdivision 8 of section 1386 of the Civil Code controls the succession to property left by the widow, dying intestate, which was community property of herself and her husband at the time of his death, though he devised all or any part thereof to her by will." All the community property in the case at bar is, therefore, to be distributed in accordance with the provisions of subdivision 8 of section 1386. That section reads: "If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent, and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased

spouse and to the descendants of any deceased brother or sister by right of representation. . . . ”

[2] Appellants argue that subdivision 8 of section 1386 makes the vesting of any interest in the heirs of John Ross dependent on the vesting of a one-half interest in a surviving father or mother or, if none, in a surviving brother or sister of Mrs. Ross, the decedent. In support of this position is cited *Estate of Ingram, supra*, but that case is not in point, for the property there was separate property and the order of descent was regulated by subdivision 2. Besides, in *Estate of Jepson, supra*, upon which appellants rely, *Estate of Ingram*, as has been shown, was declared to have been overruled by the amendment of 1905. In *Estate of Brady*, 171 Cal. 1, [151 Pac. 275], the wife had died before the husband, leaving brothers and sisters and descendants of deceased brothers and sisters. The husband died later, leaving no kin. One-half of the community property was declared escheated to the state. The state appealed from the decree of distribution, contending that the whole estate should have escheated. While the principal question to be decided in that case was whether the estate was community property, it was held that the relatives of the predeceased wife were entitled to inherit one-half of the community property, although the deceased husband left no kin to inherit his half.

In *Estate of Hill*, 179 Cal. 683, [178 Pac. 710], the husband, Stephen Hill, predeceased his wife, Isabella Hill, and left surviving him a sister, two brothers, and the descendants of a deceased sister and two deceased brothers. Isabella Hill, upon her death, left only descendants of deceased brothers and sisters. Although the principal question in that case was the constitutionality of subdivision 8 of section 1386, the court affirmed a decree distributing one-half of the property among the relatives of the wife and one-half among those of the husband, although the wife, at her death, left neither father, mother, brothers, nor sisters. (See, also, *Estate of Wenks*, 171 Cal. 607, [154 Pac. 24].) It appears from these cases that the interests of the heirs of the two deceased spouses vest independently of each other and that the heirs of John Ross are entitled to the one-half without regard to whether the other half vests in a father, mother, brothers, or sisters of Catherine Ross. The heirs of John Ross were, therefore, properly included in the



order of distribution as entitled to one-half of the community property.

[3] Appellants insist they are entitled to share that portion of the community property which was distributed to the heirs of Catherine Ross. Respondents assert: "It will be noted that the language just quoted [subdivision 8] is similar to the language of subdivision 3 of section 1386, which was construed in the *Estate of Ellen Nigro*, 172 Cal. 474, [156 Pac. 1019], wherein it was directly held that, under the said language of section 3, neither the children nor the grandchildren of a deceased brother or sister are entitled to inherit, unless a brother or sister of the deceased be living." Appellants state that "There is no merit in the point urged by respondents that as Mrs. Ross left no surviving brother or sister, appellants as grandchildren have no right to inherit. This is an attempt on the part of respondents to apply to subdivision 8 the doctrine of the cases of *Ingram* and *Nigro*, whereas it has been explicitly held by the supreme court that the doctrine never had any relevancy to a case coming within subdivision eight."

*Estate of McCauley*, 138 Cal. 546, [71 Pac. 458], was a case involving the distribution of community property left by a surviving wife. Upon the death of the wife, two nieces of the predeceased husband claimed one-half of the community property left by the wife by virtue of subdivision 9, now subdivision 8, of section 1386. The court said: "Respondents say that these nieces do not inherit under subdivision 9 of section 1386 of the Civil Code, because no brothers or sisters of the deceased spouse of McCauley were living at the time of Mrs. McCauley's death. This view of the statute is based on an alleged application of the rule laid down *In re Ingram*, 78 Cal. 586, [12 Am. St. Rep. 80, 21 Pac. 435], and *In re Carmody*, 88 Cal. 616, [26 Pac. 373], construing subdivisions 2 and 5 of section 1386. These cases throw no light on subdivision 9. This subdivision plainly provides that in a certain contingency the community property must go to 'the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister, by right of representation.' " For the purposes of the case at bar subdivision 8 of section 1386 is worded the same as subdivision 9 was at the time *Estate of McCauley*, *supra*, was decided. Subdivision 8 pro-



vides that the property descends to "the descendants of any deceased brother or sister," whereas at the time of the decision in *Estate of McCauley, supra*, subdivision 9 provided that the property should go to "the lawful issue of any deceased brother or sister." It follows that under this subdivision there need be no brother or sister surviving in order that the descendants of deceased brothers and sisters may inherit under subdivision 8. Therefore, the descendants of both Elizabeth Donohue and Bridget H. Quinn are entitled to inherit one-half of the community property by right of representation.

Finally, respondents argue that subdivision 5 is to govern the descent of the community property as well as that of the separate property. They claim that "subdivision 8 is a limitation upon the operation of the previous subdivisions of section 1386. It governs the succession of that particular part of the estate of the decedent which was the community property of himself and the predeceased spouse and controls in so far, and only in so far, as it expressly goes. In other words, it governs the succession only to the extent that its provisions specify. Putting it otherwise, it may be said that we must look to the other provisions of the statute of succession for those instances which subdivision 8 does not cover or for which it does not provide." However, inasmuch as subdivision 8 does control this case, as already appears, subdivision 5 is inapplicable. Furthermore, even if subdivision 8 did not provide a mode of descent for the case at bar, subdivision 9, which provides for escheat in cases of community property not covered by subdivision 8, would apply.

[4] 3. Appellants' next contention is that the court erred in overruling the demurrer to the petition, on the grounds that under sections 1658, 1660, and 1661 of the Code of Civil Procedure an administrator cannot petition for partial distribution of an estate, and that the petition does not comply with section 1664 of the Code of Civil Procedure relative to the determination of heirship. They assert that the outstanding claim for \$2,442.40 prevents the case from falling under section 1663 of the Code of Civil Procedure relative to the filing of a petition for partial distribution by an administrator, for the reason that it cannot be said whether the claim is an allowed claim or not until the litigation concerning it is determined. Appellants also insist that "The petition is

also fatally defective in that it affirmatively shows that the inheritance tax has not been paid. The statute expressly provides that 'before any decree of distribution of an estate is made' the court must be satisfied by the oath of the executor or administrator or otherwise that all state, county, and municipal taxes legally levied upon property of the estate, and any inheritance tax which is due and payable, have been fully paid. (Code Civ. Proc., sec. 1669.)"

This petition was presented in accordance with the terms of section 1663 of the Code of Civil Procedure, added in 1917 [Stats. 1917, p. 575]. That section provides that "Where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by a mortgage upon real estate sufficient to pay them, and the estate is not in a condition to be finally closed and distributed, the executor or administrator, or coexecutor or coadministrator, may present his petition to the court for ratable payment of the legacies, or ratable distribution of the estate to all the heirs, legatees, devisees, or their assignees, grantees or successors in interest. . . ." The petition in this case, the allegations of which were found to be true, clearly shows that a situation exists here which is within the contemplation of this statute. The fact that it has not been determined whether the claim for \$2,442.40 is or is not to be allowed is immaterial, for the code section refers only to those claims that *have been* allowed. It is not provided that it shall be requisite to a partial distribution that all claims shall have been allowed or disallowed. All that is required is that the court satisfy itself that no injury can result to the estate by reason of the distribution. None could result by reason of this outstanding claim, for there has been sufficient property set aside to cover it. Inasmuch as the petition conforms to section 1663 of the Code of Civil Procedure, it is immaterial whether or not it conforms to sections 1658, 1660, or 1661, which provide for partial distribution on the application of an heir or legatee. [5] Neither is this a special proceeding to determine heirship, as provided by section 1664, and the petition not having been presented in accordance with that section, need not comply with it. In the *William Hill Co. v. Lawler*, 116 Cal. 359, [48 Pac. 323], it was said: "The 'distribution' of an estate includes the determination of the persons who by law are entitled thereto, and also the

'proportions or parts' to which each of these persons is entitled; and the 'parts' of the estate so distributed may be segregated or undivided portions of the estate.'" Although that case involved a final distribution, the same considerations apply to a distribution under section 1663, for before the court can make an order for ratable distribution, it is necessary to know who the parties entitled to the estate are. Therefore, in such a proceeding the court may determine who the heirs are and to what proportion of the estate each is entitled.

[6] Appellants make no objection to the nonpayment of any taxes except inheritance taxes. The petition states that it was impossible to pay all the inheritance taxes until it was determined who were the heirs. *Estate of Mahoney*, 133 Cal. 180, [85 Am. St. Rep. 155, 65 Pac. 389], involved the final distribution of an estate. The trial court ordered the estate distributed, and ordered that the administrator retain an amount equal to the inheritance tax claimed by the state. Although the precise point involved there was the validity of the inheritance tax, the case is applicable for the reason that the decree of distribution was affirmed, although the taxes were unpaid, the order for the payment being included in the decree of final distribution. In that case the court declared: "There is no showing in the bill of exceptions that the taxes in question had been paid by anybody, and the last order of the court, made *nunc pro tunc*, shows that taxes to the amount of one dollar and ninety cents on each one hundred dollars are claimed to be due upon said estate, and it is ordered by the trial court that the administrator retain that amount in his possession. It will not be presumed, in the absence of a showing to that effect, that the taxes have been paid; and sections 3752 of the Political Code and 1669 of the Code of Civil Procedure make it the duty of the court to see that the taxes are paid. On the record before us we can see no error in the action of the court directing the administrator to retain the amount of the taxes claimed." Here the question involved concerns the claims of various heirs, but the inheritance tax cannot be paid until those claims are settled, as in *Estate of Mahoney, supra*, it could not be paid until the validity of the tax was determined. In view of that case we think the order of the court directing that "out of the properties of said estate so distributed there shall be deducted and paid the inheritance taxes due to the state

of California from each of said distributees" is sufficient to satisfy the court that the taxes will be fully paid by the time the order is executed.

[7] 4. Another assignment of error is as follows: "The superior court erred in its ruling admitting in evidence the testimony of petitioner Carrick relative to pedigree. The testimony was clearly incompetent and irrelevant, as Carrick was not and never had been a member of the family of the deceased John Ross, and gave no testimony concerning the declaration of the decedent on the subject." In support of this position are cited sections 1852 and 1870, subdivision 4, of the Code of Civil Procedure, and several cases, among them *Estate of James*, 124 Cal. 653, [57 Pac. 578, 1008], and *Estate of Heaton*, 135 Cal. 385, [67 Pac. 321]. Section 1852 provides: "The declaration, act or omission of a member of a family who is a decedent or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible." Section 1870, subdivision 4, is to the effect that evidence may be given upon a trial of "The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage or death of any person related by blood or marriage to such deceased person," and by subdivision 11 evidence may be received of "common reputation existing previous to the controversy, . . . in cases of pedigree." Counsel for appellants seems to have fallen into error in assuming that these provisions are exclusive. They are but exceptions to the rule that hearsay evidence is not admissible. They do not prescribe the sole method by which pedigree must be proved, and do not exclude testimony on that subject by one having primary knowledge of the facts and who is competent to testify. In *Estate of James, supra*, there was no question concerning the proof of pedigree by direct testimony of a relative. The question was whether the declarations, concededly hearsay, were of such a character as to be entitled to admission under the exception made in cases of family relationship. In *Estate of Heaton, supra*, certain declarations and statements of common reputation were held to have been improperly admitted for the purpose of proving relationship, and the court cited the rules given above, but nowhere was it intimated that these declarations or evidence concerning reputation were the only means of proving relationship. To so hold would, for in-

stance, prevent a parent from testifying as to the paternity or relationship of his or her own child. We conceive that any person having knowledge of the facts may testify concerning matters of pedigree, as on any other proper subject, his credibility and the weight of his testimony being determined in the trial court. Carrick's testimony was properly admitted.

[8] 5. A further assignment of error is that the findings are contradictory and in that respect do not sustain the decree. One of the findings is to the effect that all the allegations of the petition are true. Among these allegations so found to be true is one to the effect that "the names and residences of the heirs and distributees of said Catherine Ross, deceased, and persons entitled to distribution of said estate are as follows." In the list given appeared the names of all the relatives to whom we have referred, including those of appellants and the other descendants of Bridget H. Quinn. In the specific findings that certain named persons are the heirs, and in the conclusions of law, the appellants and the other descendants of Bridget H. Quinn are excluded. There is no error in these findings for the special finding that certain named persons are the heirs controls the general finding that all the allegations of the petition are true. It was said in *McCormick v. National Surety Co.*, 134 Cal. 510, [66 Pac. 741]: "A general finding of the court that certain averments of the complaint were true included the fact that the attached property belonged to both the defendants in the former action; but there was a special finding that it belonged to the defendant the said railroad company alone, subject to certain liens, and that the defendant Rikert had no interest therein. Appellant's contention that the special finding must prevail is correct, and this appeal must be determined upon that theory."

The judgment as to the separate property is affirmed, and as to the community property, it is modified to include the descendants of Bridget H. Quinn as well as those of Elizabeth Donohue.

Shaw, C. J., Sloane, J., Lennon, J., Wilbur, J., and Shurtleff, J., concurred.

Rehearing denied.

All the Justices concurred.

[S. F. No. 9919. In Bank.—December 5, 1921.]

**FEDERAL MUTUAL LIABILITY INSURANCE COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.**

- [1] **WORKMEN'S COMPENSATION ACT—DEPENDENT MINOR—MERETRICIOUS RELATIONSHIP WITH MOTHER.**—Under the Workmen's Compensation Act a minor is entitled to compensation for the death of an employee as a dependent member of his household in good faith, although the relations between the mother of the minor and the employee were meretricious, where they all lived together and he supported the mother and minor as if they were his own wife and daughter.
- [2] **ID.—SUPPORT OF MINOR—LIABILITY OF FATHER—IMMATERIALITY.**—Under the Workmen's Compensation Act the right of a minor to compensation as a dependent member of the family of an employee is not affected by the fact that the father of the minor is legally liable for its support under sections 205 and 206 of the Civil Code.

**PROCEEDING** in *Certiorari* to review an award of the Industrial Accident Commission. Award affirmed.

The facts are stated in the opinion of the court.

Cooley, Crowley & Lachmund for Petitioner.

A. E. Graupner for Respondents.

**LAWLOR, J.**—This is a proceeding in *certiorari* upon a petition by the Federal Mutual Liability Insurance Company to review the action of the Industrial Accident Commission in granting an award to one Bertha Fern Gnash as compensation for the death of one William G. Thompson.

Cassander K. Gnash and George Gnash, parents of Bertha Fern Gnash, the claimant, were married in Kansas in 1896 and later moved to California. The record shows that Gnash

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1. Who are dependents within meaning of Workmen's Compensation Act, notes, *Ann. Cas.* 1913E, 480; *Ann. Cas.* 1918B, 479; 13 *A. L. R.* 686; *L. R. A.* 1916A, 121, 163, 248; *L. R. A.* 1917D, 157; *L. R. A.* 1918F, 483.

"Child" in statute relating to workmen's compensation as including illegitimate child, note, *Ann. Cas.* 1918B, 258.

was a poor provider and that the members of his family were compelled to support themselves to a large extent. He was in the habit of going away and leaving them for weeks at a time, and finally left them permanently. After that Mrs. Gnash supported herself by various kinds of work until October, 1917, when she went to Yermo to do housework and cooking for the deceased, William G. Thompson, on his ranch. She took Bertha Gnash, then six years old, with her. Later the three moved to a mine near Baxter, and at about that time, according to the testimony, the relationship between Thompson and Mrs. Gnash changed. He stopped giving her wages and began paying the expenses of herself and Bertha. Mrs. Gnash continued to do the housework and cooking. In May, 1918, Mrs. Gnash, with Thompson's cooperation, started proceedings to secure a divorce from Gnash, which suit was never determined. From that time Thompson and Mrs. Gnash lived together openly as husband and wife. Mrs. Gnash used the name "Mrs. Thompson" and Bertha was called "Bertha Thompson." Thompson supported them entirely, giving the money to Mrs. Gnash, who bought what she wanted for Bertha. In February, 1920, they were living in Redlands, and Thompson was working for one W. C. Crowell as a carpenter. On February 19, 1920, he fell off a scaffold, sustaining injuries from which he died. Mrs. Gnash petitioned for compensation under the Workmen's Compensation, Insurance and Safety Act. It was stipulated that the injuries which caused Thompson's death arose out of and in the course of, his employment; that his average earnings were \$4.50 per day; that he was working six days per week; that any benefits to be awarded should be computed upon that basis, and that W. C. Crowell, the employer, was insured against risks under the Compensation Act by the petitioner, Federal Mutual Liability Insurance Company.

Upon the hearing Mrs. Gnash testified she was Thompson's wife and that Gnash was dead. She gave the date of her marriage to Thompson as November 28, 1917, and described a judge who she said performed the ceremony. After the hearing she confessed to the referee that her relationship with Thompson was meretricious. The referee, in an affidavit signed by himself, forwarded the information to the Industrial Accident Commission, and Mrs. Gnash abandoned



all claim against petitioner on her own behalf. Bertha Gnash was awarded compensation in the sum of \$4,889.98, the commission finding that she was "a member of his [Thompson's] family in good faith and wholly supported by him." A rehearing was had upon application of the petitioner. At the rehearing Mrs. Gnash testified that she had not been married to Thompson, and described the relationship as she had confessed it to the referee to have been. The Industrial Accident Commission affirmed its former finding that Bertha Gnash was a member of decedent's family and entitled to compensation. The award was affirmed, except that it was reduced to \$4,001.40, the correct sum when computed at the stipulated rate of \$4.50 per day. Petitioner thereupon brought this proceeding.

1. In support of the contention that the award should be annulled, petitioner advances two arguments. The first of these is that "Mrs. Gnash was an employee of Thompson in domestic service, and, therefore, neither she nor Bertha Fern Gnash was a member of his 'family or household' within the meaning of the Compensation Act. . . . Mrs. Gnash went to work as a cook and that fact being established, and no criminal or unlawful act being proved, it is presumed that this relationship of employer and employee continued between Thompson and Mrs. Gnash until his death." It is insisted that the record refutes any claim that the relation of employer and employee was terminated; that Mrs. Gnash testified she went to the mine to work for Thompson as a cook; that Mrs. Gnash's married daughter, Mrs. Grace Hart, testified that Mrs. Gnash did Thompson's work for him and in return she received her support and Bertha Gnash's; that the change in method of payment, or the fact of cohabitation between Thompson and Mrs. Gnash, did not alter the relation of employer and employee. Respondents assert that "the facts of the case, however, show that there came a time in the relationship between the employee [Thompson] and Mrs. Gnash when she ceased to be his employee and he ceased to be her employer, and when they began to cohabit. When the period of cohabitation began, wages ceased, and the employee commenced to support Mrs. Gnash and her child as members of his household and on a distinctly different relationship from that which existed at the time that Mrs. Gnash first went to the employee. . . . After they reached the mine,

a different relationship commenced. There they began to cohabit, and the employee paid the expenses for the woman and the child apparently without regard to the amount thereof. . . . In spite of the contentions of petitioner, the record distinctly shows beyond all doubt that Thompson and Mrs. Gnash lived together as man and wife, and that he supported Mrs. Gnash and her child as he would his own wife and daughter."

In our opinion the evidence sustains respondent's contention and the implied findings of the Industrial Accident Commission that at the time of decedent's death his relations with Mrs. Gnash were not those of an employer. It is true that Mrs. Gnash testified she went to the mine as a cook, and that her daughter testified Mrs. Gnash received her support from Thompson in return for her services. However, we think the evidence shows there was more of a change in their relationship than might be implied from the fact that Thompson stopped paying Mrs. Gnash wages, or, indeed, from the fact of the meretricious relationship. Mrs. Gnash testified: "No, he never paid me wages after I went to the mining camp. Q. Out on the desert? A. Yes. Q. Did he pay the expenses? A. He paid the expenses. Q. To whom? A. To myself and my little girl. . . . Q. When did you first become known and call yourself Thompson? A. After we visited the lawyer's office to file the divorce suit. . . . Q. You never were married to Mr. Thompson? A. No. Q. Was he agreeable to having you use his name, Thompson? A. He asked me to on account of gossiping tongues. Q. What did Bertha call him—how did she address him? [And addressing the child she asked:] A. Daddy, didn't you? Bertha Fern Gnash: [Nods head affirmatively.] . . . Q. Where was Guy Gnash living during 1919 and the first part of 1920? A. With Mr. Thompson and I. Q. Wherever you were? A. We were in Elsinore. Q. In Elsinore and Redlands? A. Yes. He was living with you as one of the family? A. Yes. . . . No, it was after he was married, he and his wife lived here with us, on 115 Church, for a little while. . . . Q. Was he living at home? A. Yes. Q. With you? A. Yes. Q. Did you charge him board and lodging? A. Yes, surely, he paid his way." Mrs. Gnash stated that her son did not contribute to her support or Bertha Gnash's "after Mr. Thompson started keeping us, supporting us, be-

cause it was not necessary." She further testified: "Q. Did you and Mr. Thompson have any plans, any expectations of getting married? A. We surely did. Q. Had you discussed that with him? A. Yes. Q. And what did you intend to do? A. We intended to get married as soon as Mr. Maloney, after the suit was filed, but we just neglected sending in the rest of the money; in fact, we bought some property which tied us up." Guy Gnash, Mrs. Gnash's adult son, testified he met Thompson in 1917 on a train. "Q. Was your mother then living with him? A. No, sir. Q. Was she working for him? A. Yes, I believe she was working for him. Yes, she was working for him. . . . Q. Was that the time [when they were at Afton] when your mother began living with Mr. Thompson? A. No. I don't think so. Q. When did she begin living with him? A. I think that's when they went to Elsinore. Q. She was working for him in Afton? A. She was working for him in Afton." It thus appears that in the latter part of their association Thompson paid all the expenses and supported Mrs. Gnash and Bertha Gnash; that it was at his request that they assumed his name; that he was assisting Mrs. Gnash to secure a divorce; that he intended to marry her when the divorce was obtained; that they bought property together; that Mrs. Gnash's son lived "at home" with them as "one of the family," and that the difference in the relationship between them while Mrs. Gnash was "working for" Thompson and while she was "living with him" was clearly recognized by Mrs. Gnash's son. It is idle to assume that when he spoke of his mother as "living with" Thompson he meant anything else than what the words import. In our opinion these facts show that at the time of Thompson's death Mrs. Gnash was a member of his household and supported as such, and that the money Thompson gave her was not paid as wages to an employee, but was given to Mrs. Gnash for herself and Bertha Gnash as if spent by the head of a family for those in the household.

*Moore Shipbuilding Corp. v. Industrial Acc. Com.*, 185 Cal. 200, [13 A. L. R. 676, 196 Pac. 257], was a case in which the facts were similar to those in the case at bar. There a woman was living with an employee who was killed, and with them lived the claimant, the woman's young daughter. In that case the court said: "Again, the word 'household'

is variously used to designate people, generally, who live together in the same house, including the family, servants, and boarders; or it may be used as including only members of the family relation. It is probable that the two terms are coupled together in this statute to indicate that they are used synonymously, the 'family' to include only those of the household who are thus intimately associated, the 'household' to exclude those of the family not living in the home. There can be no doubt that Bauer, Mrs. Miller, and the little girl constituted a family or household. They were living together in all the interdependency of man and wife and their legitimate offspring. The only thing to exclude Mrs. Miller from the benefit of this relation was lack of good faith." [1] We think the facts of the case at bar, as already brought out, show that the three people were living together as a family and were members of one household, it being held in *Moore Shipbuilding Corp. v. Industrial Acc. Com.*, *supra*, that people living together in such a relationship may constitute a household.

2. Petitioner's next contention is that Bertha Fern Gnash, being a legal dependent of her father, George Gnash, could not legally be a total dependent of the deceased, Will Thompson. This claim is based upon the fact that sections 205 and 206 of the Civil Code make a father legally liable for the support of a minor child, and that section 14, subdivision *a*, of the Compensation Act, raises a conclusive presumption that a child under the age of eighteen is wholly dependent "upon the parent with whom he or they are living at the time of the death of such parent or for whose maintenance such parent was legally liable at the time of death."

Even if George Gnash is legally liable for the support of Bertha Gnash, we are not prepared to hold that this precludes her from becoming wholly a dependent on Thompson within the meaning of the Compensation Act. Section 14 of that act (Stats. 1919, pp. 910, 917), provides that "(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee: . . . (1) A wife upon a husband with whom she was living at the time of his injury, or for whose support such husband was legally liable at the time of his injury. (2) A child or children under the age of eighteen years, or over said age, but physically or mentally incapacitated from earning, upon the parent

with whom he or they are living at the time of the injury of such parent or for whose maintenance such parent was legally liable at the time of injury, there being no surviving dependent parent.

“(b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee.

“(c) No person shall be considered a dependent of any deceased employee unless in good faith a member of the family or household of such employee, . . . ”

It will be noted that subdivision *a* does not provide generally, as contended by petitioner, that a child is conclusively presumed to be dependent on the parent who is legally liable for his support. That subdivision provides that when a child's parent is killed and no dependent parent survives, the child is presumed to have been dependent on the deceased parent. That situation is not presented here, for, even if it had been Bertha Gnash's father who was killed, still she has a dependent parent surviving—Mrs. Gnash (Civ. Code, secs. 155, 174, 175)—who admittedly has no claim under the Compensation Act because of Thompson's death. The case, therefore, falls within subdivision *b*, which provides that in all other cases dependency shall be determined in accordance with the fact as it may exist at the time of the injury.

In *Moore Shipbuilding Corp. v. Industrial Acc. Com.*, *supra*, there was a finding that Mrs. Miller's husband, the claimant's father, was dead. An examination of the record shows that this finding was made in the first hearing of the cause, in spite of the testimony of Mrs. Miller to the effect that at the time she was living with Bauer she knew she was then the wife of another man. Upon the rehearing, however, which was a hearing *de novo*, there was no such finding. In that case the effect of Miller's legal liability for the claimant's support was not discussed. However, the fact that Bauer was not legally liable for her support was considered and the court said: “The need of relief from the deprivation caused by the death of the employee and the questions of public policy involved rest upon the fact that the employee has in good faith taken into his home and

assumed the support of one without other means of subsistence. The hardship to the individual dependent and the incidental burden to the insurer or to society from the death of a bread-winner are no different whether the maintenance of the dependent has been voluntarily and gratuitously assumed, or legally imposed.

“As has been pointed out, the benefits of this law are not provided as an indemnity for negligent acts committed or as compensation for legal damages sustained, but is an economic insurance measure to prevent a sudden break in the contribution of the worker to society, by his accidental death in the course of his employment. From this economic standpoint it makes no difference whether the workman's earnings are being distributed to those whose support he has voluntarily assumed, or to those who are legally entitled to such support. In either case they are the reliance of dependent members of society. The only difficulty is that where there is no legal dependence it is harder to determine that the contribution of support has been made so as to constitute the recipient a dependent in good faith. . . .

“There are three vital conditions required to establish dependency in this case under the Compensation Act. First, was Ida Miller actually dependent upon the decedent for her support; second, was she a member of his family or household; third, was the relation or connection sustained in good faith?”

[2] It is clear both from the wording of the act and from that case that the benefit of the statute does not depend upon legal liability for support. As pointed out, there is no presumption that because Gnash was legally liable for Bertha Gnash's support, she was wholly dependent upon him, within the meaning of the Compensation Act, and if she were in fact a dependent of Thompson, the effect of Thompson's death upon her is the same whether she has a father who is legally liable for her support or not. If she was in fact a dependent of Thompson, and was in good faith a member of his household, she is entitled to compensation, whether or not her father was alive.

It was found by the Industrial Accident Commission that “applicant Bertha Fern Gnash was at the time of the death of the employee, in good faith a member of his household and was totally dependent upon him for support at said time

within the terms of the Workmen's Compensation, Insurance and Safety Act of 1917." As we have shown, Mrs. Gnash was not an employee of Thompson at the time of his death, and the money paid for Bertha Gnash's support was not paid to Mrs. Gnash as wages. Concerning Bertha's position in Thompson's household, Mrs. Gnash testified: "Q. Have they [Mrs. Hart and her husband] made any gifts of money, clothes or anything else to Bertha? A. Some clothes for Bertha since Mr. Thompson was killed. Q. Before Mr. Thompson was killed? A. No, not before; Mr. Thompson supported her. . . . Q. Did Mr. Thompson display any special affection for Bertha? A. Well, no, nothing more than a father, of course; he showed her more fatherly love than her own did, a whole lot, or ever did, as far as supporting her. . . . Q. Where did you get the money and the funds that you used to buy the clothing for Bertha and yourself since you were living with Mr. Thompson? A. From Mr. Thompson. Q. Did he understand that his money was being used to support Bertha that way? A. Yes. Q. To buy her clothing? A. Most assuredly. Q. Did he ever buy any school books? A. No, because books were furnished; he did not have to buy school books." Bertha Gnash testified: "Q. Do you know where you got your dresses and clothes that you wore; where did they come from? A. My father, Mr. Thompson. Q. What did you call Mr. Thompson? A. Father. Q. What is your name? A. Bertha Fern Thompson. Q. Was Mr. Thompson good to you? A. Yes." Mrs. Grace Hart testified: "Q. Do you know whether or not she [Bertha Gnash] has recognized Mr. Thompson, the deceased, as her father? A. Yes. Q. Did she look upon him as her father? A. She did. Q. Do you know whether she ever knew the difference? A. She never. . . . Q. Do you happen to know whether Mr. Gnash contributed anything to your mother for her support or for the support of Bertha since he has been away? A. No. Q. He has not? A. He has not." Guy Gnash testified further: "Q. Did you have occasion to observe how Mr. Thompson provided for your mother? A. He provided well for her. Q. Who else lived with them? A. Bertha Fern. Q. Did he provide for her? A. He did. Q. Did she consider him her father, did she treat him as though she thought he was her father? A. Yes, she did. Q. What did she call him, what was her



term? A. Sometimes she called him 'Dad.' . . . Q. You knew that your sister Bertha was called Bertha Fern Thompson? A. Yes."

This evidence shows clearly that Thompson treated Bertha as if she were his own child and that he provided for her as a father might. It is ample to support the finding of the Industrial Accident Commission that Bertha Fern Gnash was wholly dependent on Thompson and was a member of his household. There can be no question but that she regarded him as a father and that she was in good faith a member of his household.

Petitioner has cited *Farrington v. Lachman & Jacobi*, 1 I. A. C. of Cal. (Pt. I) 116, a case wherein a father, whose children were being cared for by another, was killed, and the children were allowed compensation. It appears the mother of the children had died before the father. There being no surviving dependent parent, the case fell squarely within subdivision *a* of section 14 of the Compensation Act, and the children were to be conclusively presumed wholly dependent upon the father. *Wilcut v. Cudahy Packing Co.*, 4 I. A. C. of Cal. 308, a case of a deserted wife, also came within subdivision *a* of section 14, and in *Aldinger v. Ransome Concrete Co.*, 1 I. A. C. of Cal. (Pt. I) 151, the commission found the applicant's mother to have been, as a fact, an employee of the deceased, with whom she was living, and that the mother and not the deceased supported the child. In the case at bar the claimant's mother was not an employee of the decedent, but, as we have pointed out, was a member of his household.

The award is affirmed.

Sloane, J., Shurtleff, J., Wilbur, J., Lennon, J., and Waste, J., concurred.

SHAW, C. J.—Dissenting. I dissent.

I do not believe that persons living together in the relation shown in this case can justly or properly be considered as constituting a lawful family or household within the meaning of the Workmen's Compensation, Insurance and Safety Act. This court has heretofore decided that such persons may be a lawful household, but I did not concur therein. On such a question of ordinary morality, I cannot defer to or follow that decision.

[Crim. No. 2421. In Bank.—December 5, 1921.]

In the Matter of the Application of ZAROOHE KANDARIAN for a Writ of Habeas Corpus.

- [1] GUARDIAN AND WARD—APPOINTMENT OF GUARDIANS—JURISDICTION. The superior court has jurisdiction and power to appoint guardians.
- [2] ID.—VALIDITY OF ORDER.—An order appointing a guardian is valid, except on appeal, notwithstanding the fact that some other person may have been lawfully entitled to letters.
- [3] CONTEMPT OF COURT—SERVICE OF COPY OF ORDER.—An order adjudging a person in contempt of court made on a hearing wherein such person was regularly cited and duly appeared is not rendered invalid or void by the fact that no copy of the order was served on such person.
- [4] HABEAS CORPUS—REFUSAL TO PAY MONEYS TO GUARDIAN—STATUS OF GUARDIAN—PETITION.—In a petition for a writ of *habeas corpus* to secure release from custody for violation of an order directing the petitioner to turn over to the guardian of the estates of her minor children certain moneys belonging to them, the mere allegation that the person to whom she is directed to pay the moneys is not the legally appointed, qualified, and acting guardian of the minors is a bare conclusion of law.
- [5] APPEAL — ORDER APPOINTING GUARDIAN — TIME.—An appeal from an order appointing a guardian taken more than six months after the making of the order is too late.

APPLICATION for a Writ of Habeas Corpus to secure release from custody for contempt of court for refusal to turn over moneys to a guardian of estates of minors. Denied.

The petitioner in violation of an order of court refused to turn over to the guardian of the estates of her minor children certain moneys belonging to them, on the grounds that such guardian was not their legally appointed guardian and that she, as their mother, was entitled to letters of guardianship of their persons and estates.

A. M. Drew for Petitioner.

SHAW, C. J.—The petition for a writ of *habeas corpus* herein is denied for the following reasons:

[1] 1. The superior court of Fresno County has jurisdiction and power to appoint guardians.

[2] 2. The fact that the petitioner was the mother of the minor children and as such would be entitled to their guardianship does not make the appointment of K. Kandarian as such guardian void. It is presumed, in the absence of any showing to the contrary, that the proper notices and proceedings leading up to the appointment of K. Kandarian were had. This being so, an order appointing a guardian is valid, except on appeal, notwithstanding the fact that some other person may have been lawfully entitled to letters.

[3] 3. The petitioner was regularly cited and duly appeared at the hearing of the charge against her of contempt of court on November 9, 1921. The order made at such hearing is not rendered invalid or void by the fact that no copy thereof was served on the petitioner. This court cannot in a collateral attack of this character inquire whether the contempt was committed as charged in the affidavit upon which said proceeding was initiated. [4] The mere allegation that K. Kandarian is not the legally appointed, qualified, and acting guardian of said minors is a bare conclusion of law and is not sufficient to authorize the issuing of a writ of *habeas corpus*. Moreover, it is not justified by the facts alleged in the petition as above mentioned nor by any other facts alleged therein.

[5] 4. The appeal attempted to be taken from the order made March 7, 1921, appointing the said K. Kandarian as guardian, by means of a notice of appeal filed on November 25, 1921, is wholly ineffectual to give this court any jurisdiction of the appeal or to affect in any manner the validity of the order appointing K. Kandarian as guardian or to suspend proceedings under it. Such appeal was taken too late.

Shurtleff, J., Lennon, J., Richards, J., *pro tem.*, Sloane, J., Waste, J., and Wilbur, J., concurred.

[S. F. No. 9318. In Bank.—December 6, 1921.]

CHARLES G. MINIFIE et al., as Executors, etc., Appellants, v. FORREST S. ROWLEY et al., Respondents.

- [1] **PARTNERSHIP — DEATH OF PARTNER — RIGHT OF SURVIVOR.**—As against a surviving partner, the administrator or executor of a deceased partner has, under the provisions of the Code of Civil Procedure, no power to handle the property or settle the affairs of the partnership, for the right to the possession, control, and disposition of the partnership property vests in the surviving partner, who has full authority to consummate all acts necessary to liquidate the affairs of the partnership.
- [2] **ID.—RECOVERY OF PARTNERSHIP PROPERTY—PLEADING—PARTIES.**—Where all the partners die before the liquidation of the partnership affairs has been completed, the executors of the will of the last surviving partner are entitled to bring an action for the recovery of partnership property without joining the executors of the wills or administrators of the estates of the other deceased partners.
- [3] **STATUTE OF LIMITATIONS — PROMISSORY NOTE — PAYMENT OF INTEREST—LETTER—NEW CONTRACT.**—Where payment of interest on a promissory note after the expiration of the statutory period of limitation is accompanied by a letter evidencing such payment, the acknowledgment of the debt is "contained in some writing," within the meaning of section 360 of the Code of Civil Procedure, even though the letter in and of itself does not contain a distinct recognition of the liability.
- [4] **ID.—DEBTOR AS EXECUTOR—TOLLING OF STATUTE.**—Where a debtor becomes the executor of the will of his creditor, he is chargeable with the amount of the indebtedness as for so much money in his hands and continues liable therefor, irrespective of the running of the period of the statute of limitations against the debt itself, by reason of the change in the character of his obligation due to his intervening fiduciary capacity.
- [5] **CORPORATIONS—DISREGARD OF ENTITY.**—Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and *vice versa*, it must be made to appear that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased, and that the facts are such that an adherence to the fiction of the separate existence of the corporation

would, under the particular circumstances, sanction a fraud or promote injustice.

- [6] ID.—PROMISSORY NOTE OF CORPORATION—LIABILITY OF INDIVIDUAL—IDENTITY OF PARTIES.—An individual is personally liable on a corporation note given in renewal of his individual notes, where such corporation is but the double or "*alter ego*" of the individual and no dealings exist between the debtor and the corporation as distinct from the individual.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George H. Cabaniss, Judge. Reversed.

The facts are stated in the opinion of the court.

Percy E. Towne, Metson, Drew & Mackenzie, Heller, Powers & Ehrman, and Heller, Ehrman, White & McAuliffe for Appellants.

Mastick & Partridge and H. F. Chadbourne for Respondents.

LENNON, J.—Demurrers to the complaint in the present action were sustained without leave to amend and a judgment was rendered in favor of defendants, from which plaintiffs appeal.

In the complaint, which is under attack, it is alleged that on July 8, 1907, defendant Forrest S. Rowley was indebted to the partnership of Jones & Givens in the sum of ten thousand dollars, the indebtedness being evidenced by two promissory notes of said defendant for the sum of five thousand dollars each, dated July 8, 1907. On January 3, 1910, Forrest S. Rowley, "for the purpose of renewing said notes of July 8, 1907, and for the purpose of continuing in existence the evidence of said indebtedness," delivered to said Jones & Givens a certain promissory note, executed by the Rowley Investment Company, for ten thousand dollars, due one day after date and bearing interest at the rate of four per cent per annum from date until paid. For several years the Rowley Investment Company paid the interest on the note, making its last payment on January 6, 1914, by a check accompanied by a letter reading:

“San Francisco, California, January 6th, 1914.

“Jones & Givens,

“8th Floor Crocker Bldg.,

“San Francisco, Calif.

“Gentlemen:

“Herewith check 8889—Amount 100.00 in payment 3 months interest due you on \$10,000 loan. That is to say interest from October 3rd, 1913, to January 3rd, 1914.

“Very truly yours,

“(Signed) THE ROWLEY INVESTMENT Co. (INC.)”

In 1913, Charles S. Givens, one of the members of the partnership which held the ten thousand dollar note, died and Samuel Jones, as surviving partner of the said firm of Jones & Givens, continued in possession of the partnership funds, securities, and assets and engaged in the liquidation of the affairs of said copartnership. Prior to the completion of the liquidation, and also prior to the conclusion of the administration of the estate of Charles S. Givens, deceased, the surviving partner, Samuel Jones, died, on May 1, 1915. Subsequently plaintiffs, Charles G. Minifie and Ralph T. Jones, and defendant Forrest S. Rowley were appointed and qualified as executors of the will of Samuel Jones. The ten thousand dollar note and the interest thereon falling due after January 3, 1914, remained unpaid. The present action for the amount of said note, and interest, was commenced January 20, 1919, by Charles G. Minifie and Ralph T. Jones, as executors of the will of Samuel Jones, deceased, against the Rowley Investment Company and Forrest S. Rowley, who refused to join as plaintiff.

Both defendants demurred to the complaint upon the same grounds, eight in number. The first ground relied upon was that of misjoinder of parties in this respect: That the executors of the will of Samuel Jones, the last surviving partner, brought the action without joining, either as plaintiffs or defendants, the executors of the will of Charles S. Givens, the other deceased partner. The first question to be considered is, therefore, whether the executors of the will of the deceased partner, Charles S. Givens, were necessary parties to the action.

[1] As against a surviving partner, the administrator or executor of a deceased partner has, under the provisions of

our Code of Civil Procedure, no power to handle the property or settle the affairs of the partnership, for the right to the possession, control, and disposition of the partnership property vests in the surviving partner, who has full authority to consummate all acts necessary to liquidate the affairs of the partnership. (Code Civ. Proc., sec. 1585; *Berson v. Ewing*, 84 Cal. 89, [23 Pac. 1112]; *Cooley v. Miller & Lux*, 168 Cal. 120, [142 Pac. 83]; *Raisch v. Warren*, 18 Cal. App. 655, 665, [124 Pac. 95].) While the code thus specifically provides for the control of the partnership property as long as some member of the firm survives, there is no law expressly applying in the event that all of the partners die before the liquidation of the partnership affairs has been completed, which is the situation here presented. It is, however, unnecessary in this case to determine what the rights of the representatives of the estates of the respective partners may be in such a situation in regard to the management and disposition of the partnership property.

[2] Without deciding that question, it is clear that under the general law the executors of the will of the last surviving partner are entitled to bring the present action for the recovery of partnership property without joining the executors of the will of the deceased partner, Charles S. Givens. In actions upon claims for or against the partnership, the surviving partner may sue or be sued alone, and in such actions by or against the surviving partner the executors or administrators of a deceased partner are not necessary parties. (*Corson v. Berson*, 86 Cal. 433, [25 Pac. 7].) Section 1582 of the Code of Civil Procedure provides: "Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by or against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates." There is no law expressly or impliedly altering the operation of section 1582 of the Code of Civil Procedure, in cases where the decedent is a surviving partner. Therefore, since the present action for the recovery of the money alleged to be due the partnership was one which might have been maintained by the surviving partner, Samuel Jones, during his lifetime without



joining the executors or administrators of his deceased partner, the right and duty of instituting this action passed to and devolved upon the executors of the will of said Samuel Jones.

[3] Although the note sued upon matured January 4, 1910, and the present action was brought January 20, 1919, the demurrers cannot be sustained upon the grounds that the action is barred by the provisions of either section 337 or section 343 of the Code of Civil Procedure. Under section 337 of the Code of Civil Procedure the note would have been barred on January 4, 1914, four years from the date of maturity, but subsequent to that date, on January 6, 1914, the Rowley Investment Company made a payment of interest on the note, accompanied by a letter evidencing the said payment, which is quoted above. It is doubtful whether the letter in question contained a distinct, unqualified, unconditional recognition of the obligation as due at the date of the writing so as to amount, in and of itself, to an acknowledgment or promise sufficient to take the case out of the operation of the statute of limitations under the provisions of section 360 of the Code of Civil Procedure, as that section has been interpreted by this court. (*Biddell v. Brizzolara*, 56 Cal. 374, 382; *Pierce v. Merrill*, 128 Cal. 473, 476, [79 Am. St. Rep. 63, 61 Pac. 67]; *Powell v. Petch*, 166 Cal. 329, [136 Pac. 55].) However, it is unnecessary for the letter itself to amount to a written promise or acknowledgment of the debt as due, for it accompanied a payment of interest.

Section 360 of the Code of Civil Procedure is as follows: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby." The effect of this provision is not to require that the new or continuing contract must consist of a *written* acknowledgment or promise. There may be an acknowledgment by conduct, as well as by words. In the case of a part payment, for instance, of either principal or interest, the conduct itself has always been deemed, unless accompanied by qualifications, an unequivocal acknowledgment of a subsisting contract or liability from which a new contract to pay the debt must be inferred. (*Barron v. Kennedy*, 17

Cal. 574, 577.) Section 360 of the Code of Civil Procedure makes no attempt to regulate the character of the acknowledgment itself; its sole purpose is to alter the form of the evidence by preventing parol proof of the acknowledgment or promise whether the latter be in the form of words or acts. (*Pena v. Vance*, 21 Cal. 142; *Concannon v. Smith*, 134 Cal. 14, 20, [66 Pac. 40].) Therefore, where an act of payment after the statutory period is evidenced by a clear and unqualified written memorandum, the acknowledgment is "contained in some writing" within the meaning of the code section even though the writing itself does not contain a distinct recognition of a subsisting liability. The acknowledgment consists of the act of payment, from which a new contract is inferred. The new contract arose, therefore, on January 6, 1914, and that fact removed the case from the operation of the statute of limitations in so far as the bar attaching on January 4, 1914, is concerned. Notwithstanding this circumstance, however, the action was not brought within time unless there are other facts which prevented the bar of the statute of limitations from attaching, or removing the bar if any did attach, between January 6, 1914, the date of the making of the new promise, and January 20, 1919, the date on which the present complaint was filed.

[4] On June 3, 1915, defendant Forrest S. Rowley was appointed an executor of the will of Samuel Jones, the last surviving partner of the firm to which the debt herein sued upon is alleged to have been due. "The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due." (Code Civ. Proc., sec. 1447.) As a necessary consequence, if defendant Forrest S. Rowley owed the ten thousand dollars here in controversy on June 3, 1915, when he became executor, he became chargeable with that sum as for so much money in his hands and continued liable therefor, irrespective of the running of the period of the statute of limitations against the debt itself, by reason of the change in the character of his obligation due to his intervening fiduciary capacity. (*Treweek v. Howard*, 105 Cal. 434, [39 Pac. 20].) It is

apparent from what has previously been said that this ten thousand dollar debt was not barred on June 3, 1915; the sole question is, therefore, whether the defendant Forrest S. Rowley was individually liable upon that debt. While the ten thousand dollar note was signed, and interest paid, according to the complaint, not by defendant Forrest S. Rowley, but by the Rowley Investment Company, nevertheless plaintiffs claim that the facts alleged in the complaint are sufficient to justify a disregard of the corporate entity of the Rowley Investment Company and compel a recognition of the liability of Forrest S. Rowley on the note.

[5] Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and *vice versa*, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice. (*Erkenbrecher v. Grant*, ante, p. 7, [200 Pac. 641]; *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, [155 Pac. 986].) The complaint in the present action must comply with these tests if it is to be upheld upon the theory of the identity of the Rowley Investment Company with the defendant Forrest S. Rowley.

[6] The allegations of the complaint are, in part, to the effect that defendant Rowley is and at all times since September, 1908, has been the owner and holder of all the subscribed, issued, and outstanding capital stock of the said corporation, excepting only a sufficient number of shares necessary to qualify other persons to act as directors, not exceeding one share to each of such persons; that he at all times mentioned controlled the board of directors thereof; that at all times mentioned he was the representative of and only person interested in the said corporation. There is, therefore, an adequate observance of the first requirement above set forth, for plaintiffs do not merely aver that the Rowley Investment Company was an instrumentality which was used for the individual benefit of the defendant Rowley,

but, in substance and effect, allege that the corporation was but the double, or "*alter ego*" of the defendant Rowley. That is to say, they allege facts showing the virtual identity of the two defendants.

With regard to the second requisite, it must be conceded that the allegations of the complaint are not as definite as might be desired and the interests of clarity would doubtless be subserved by an amendment in this respect. Nevertheless, the complaint is not fatally defective, the allegations being sufficient to reveal a situation justifying a disregard of the corporate entity. It is not necessary, as defendants contend, that the complaint allege actual fraud; it is sufficient if the facts set forth disclose that the dealings were in form with a corporation but in reality with an individual and that a refusal to recognize this fact will bring about inequitable results. (*Erkenbrecher v. Grant, supra; Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310, [97 C. C. A. 144]; Civ. Code, sec. 3528.) Upon this phase of the case it is alleged in the complaint that the defendant Rowley was indebted to the partnership in the sum of ten thousand dollars, evidenced by his individual promissory notes. For the purpose of renewing these notes he made and delivered to the creditor a new note, signed by the Rowley Investment Company, a corporation, which was at that time and continued to be but the "*alter ego*" of the said defendant Rowley, there being no dealings between the partnership and the corporation as distinct from the individual Rowley. Having subsequently become an executor of the will of one of the partners, defendant Rowley now seeks to avoid the incidents of his fiduciary relationship solely by reliance upon the fiction of the independent existence of an organization which was in effect nothing more than a form assumed by him in his business dealings. The case is, therefore, distinguishable from the case of *Erkenbrecher v. Grant, supra*, recently decided by this court, for in that case, as stated in the opinion, the dealings in the corporate form were wholly devoid of inequitable results, whereas in the instant case the assumption of that form will result in the avoidance of a legal obligation, unless equity intervenes to prevent this injustice. This equity does by penetrating the fiction of the independent existence of the corporation.

The discussion and disposition of this last point disposes of the remaining grounds of the demurrer. If the identity of Forrest Rowley and the Rowley Investment Company is recognized, then there is no uncertainty, or unintelligibility, or ambiguity in the allegation to the effect that the note executed by the corporation was made, executed, and delivered by defendant Rowley, and there is no misjoinder of parties defendant. Likewise, in view of what has been said, we see no merit in the general demurrer.

The judgment is reversed, with directions to the court below to enter an order overruling the demurrers.

Sloane, J., Wilbur, J., Shaw, C. J., Waste, J., and Richards, J., *pro tem.*, concurred.

Rehearing denied.

All the Justices concurred, except Lawlor, J., who was absent.

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[S. F. No. 9332. In Bank.—December 7, 1921.]

JOSEPH CRAIG, Respondent, v. RICHARD WHITE,  
Appellant.

- [1] PUBLIC LANDS — UPLANDS BORDERING ON LAKE — PATENT.—A United States patent to uplands bordering on a lake conveys title to the actual margin of the lake, although the surveyed meander line does not conform to the actual water line of the lake, and a state patent under the act of March 24, 1893, to land between such meander line and the lake, conveys no title, in the absence of proof of a recession or drainage of the waters of the lake.
- [2] VENDOR AND VENDEE—EXECUTORY CONTRACT—PRIOR APPROVAL OF TITLE.—An approval of title by a purchaser before entering into a contract of purchase does not, in the absence of an express agreement, or of facts constituting an estoppel, operate as a waiver of the right to a deed carrying the title, on the final execution of the contract.

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1. Waters and watercourses as boundaries, notes, 30 Am. Dec. 286; 27 Am. St. Rep. 56.

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- [3] **ID.—PAYMENT AND ACCEPTANCE OF DEED — PRIOR APPROVAL OF TITLE.**—Ordinarily the payment of the purchase price and acceptance of a deed to land, after approval of title by the purchaser, precludes him from rescinding or recovering the purchase money upon failure of his title.
- [4] **ID.—MERCHANTABLE TITLE—IMPLIED AGREEMENT.**—In case of an executory contract, there is an implied agreement on the part of the vendor to convey a merchantable title, and failure to do so on demand and upon tender of final payment is a breach of the contract which justifies rescission and recovery of the money paid by the purchaser.
- [5] **ID.—PLACING OF DEED IN ESCROW—CONTRACT NOT EXECUTED.**—The placing in escrow of a grant, bargain, and sale deed without express covenants, to be delivered to the grantee upon the completion of stated payments, and providing for a forfeiture of all rights of the grantee for failure to make any payments within thirty days after maturity, does not, on its face, constitute an executed conveyance such as to merge the implied agreement of the contract to convey a good title into the covenants of the deed.
- [6] **ID.—EXAMINATION AND ACCEPTANCE OF IMPERFECT TITLE — ESTOPPEL.**—An examination and acceptance of an imperfect title, precedent to entering upon a contract to purchase, might operate as an estoppel against rescission, either by express agreement or under circumstances giving substantial advantage to the purchaser, or operating to the detriment of the vendor.
- [7] **ID.—RESCISSION—WAIVER—KNOWLEDGE.**—A waiver of right of rescission implies knowledge, actual or constructive, of the existence of the right and an intention to relinquish it.
- [8] **ID.—NOTICE OF RESCISSION—WANT OF LACHES.**—A purchaser is not guilty of laches in failing to give notice of rescission before the time has arrived for final payment and delivery of the deed, since the vendor has until such time to make his title good.

APPEAL from a judgment of the Superior Court of Alameda County. Everett J. Brown, Judge. Affirmed.

The facts are stated in the opinion of the court.

Samuel M. Shortridge for Appellant.

A E. Shaw and A. E. Cooley for Respondent.

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8. Necessity and effect of notice of rescission before party can be placed in default as to time for performance of contract, note, 4 A. L. R. 822.

SLOANE, J.—The plaintiff in this action brought suit to recover the sum of \$20,797.17, paid to defendant as part of the purchase price of real estate under a contract which was rescinded by plaintiff, the purchaser, because of failure of title in the defendant, the vendor.

Judgment was for plaintiff and defendant appeals.

The finding of the trial court that the defendant had no title to the land at any time and failed to convey title upon demand and tender of full performance of the contract by plaintiff is amply supported by the evidence.

The original contract of purchase and sale called for a conveyance of all of the defendant's "holdings on the shore of Clear Lake in Lake County, Calif., being about 350 acres and embracing about 13 miles of lake shore land."

[1] The evidence disclosed that the lands referred to consisted of a strip of waterfront along the borders of the lake lying between the meander line as established by the United States survey and the actual water line of the lake.

According to the calls of the United States field-notes, it is shown that this meander line does not conform to the actual waterline of the lake, but that the meander line is a sufficient distance from the actual border of the lake to inclose between such line and the water line of the lake the quantity of land called for by the contract between plaintiff and defendant.

Defendant's claim of title was evidenced by patents from the state of California purporting to convey by courses and distances the land between the meander line and the lake "under an act of the legislature of the state of California entitled an act regulating the sale of the lands uncovered by the recession or drainage of the waters of inland lakes and unsegregated swamp and overflow lands, and validating sales and surveys heretofore made," approved March 24, 1893.

These conveyances were made on the theory that the meander line as marked by the United States survey constituted the actual boundary between the uplands belonging to the government and the state lands included within the borders of the lake. Prior to the issuance of state patents to the defendant, United States patents had



been duly issued to settlers on the government uplands bordering on this part of the lake, which patents, under the established rule governing such transfers, conveyed title to the patentees, to the actual margin of the lake. (Civ. Code, sec. 830; *Lamprey v. State*, 52 Minn. 181, [38 Am. St. Rep. 541, 18 L. R. A. 670, 53 N. W. 1139]; *Hardin v. Jordan*, 140 U. S. 371, [35 L. Ed. 428, 11 Sup. Ct. Rep. 808, see, also, Rose's U. S. Notes].)

It also was shown in evidence that there had been no recession or drainage of the waters of the lake and that there had been, therefore, no additional land uncovered below the original water line to which defendant's state patents could attach. The title, therefore, to all the land covered by the contract between plaintiff and defendant was vested in other parties under the United States patents. There was, moreover, introduced in evidence the judgment-roll in an action by a grantee under the government patents, in which action both the plaintiff and defendant here were made defendants, wherein a judgment had been given and had become final, quieting title in the claimants under the government title, and wherein it was found "that said defendants Richard White and Joseph Craig have not, nor has either of them any estate, right, title, or interest whatever in or to any of said lands or premises," referring to lands described in the complaint. This description covered all lands bordering on the lake included within eleven of the thirteen miles of lake front in controversy here. We think this judgment-roll was properly admitted in evidence.

Neither of the parties to this action were ever in possession of the land contracted for. There was, if not a complete failure of consideration for the money paid to defendant under this contract, such an approximation to a complete failure as to justify a rescission by plaintiff and the recovery of the money paid, unless defendant was justified to raise the question of failure of title by waiver or laches.

The instrument setting out the terms of the contract for the sale of this land, dated July 16, 1906, and signed by the defendant, acknowledged the receipt of one hundred dollars from the plaintiff, on account of purchase price of the land, and provided that "said Craig is to have until and including the 2d day of August, 1906, to examine title to

property, and shall have to that date to pay an additional sum of \$1500.00, and to have a deed placed in escrow to be delivered to him, his heirs or assigns, upon condition that he or they shall pay to me or my heirs or assigns the additional sum of \$14,400," payable in designated annual installments. It was also specified that, "should the title of said undersigned prove unsatisfactory to said Craig," that he, the said Craig, "may on or before August 2, 1906, have return of said \$100, and cancel this contract."

On the date specified, August 2, 1906, plaintiff, by his attorney, notified defendant that he was ready and willing to make the one thousand five hundred dollar payment, accepted the terms of the contract and demanded that the deed to the premises be executed and placed in escrow as therein provided.

The deed was prepared, signed, and acknowledged by defendant, and, after its inspection by plaintiff, placed in escrow with a trust company under an escrow agreement which set out the terms and conditions for the deferred payments, and directed the delivery of deed to plaintiff when the payments were completed.

The deferred payments were thereafter met substantially as required by the contract, or as extended by agreement. It is questioned by appellant that some of the extensions were authorized, but the payments were accepted without protest, and no default on the part of plaintiff can be predicated upon such delays as occurred. Prior to the falling due of the last installment, defendant's claim of title was called in question by the suit of the holder of title under the governmental patents. Plaintiff thereafter and within the period allowed by his contract tendered payment of the balance due upon condition that the defendant convey to him a good title to the land in question. This was not done, and this suit was brought for the recovery of the purchase money already paid.

[2] The main contention of appellant, and the real point at issue on this appeal, is as to whether or not the election of plaintiff to affirm the contract and consummate the deal, after the period of seventeen days given to examine title and exercise his option to purchase, constituted such an acceptance of whatever title defendant might have, irrespective of its validity, as to estop him from pleading a failure of

consideration. Time was given under this agreement of the vendor to sell for the examination of title as a condition precedent, not to the acceptance of a conveyance, but as preliminary to entering upon the contract of purchase. The approval of the title under such a provision should not, in the absence of express agreement, or of facts constituting an estoppel, operate as a waiver of the right to a deed carrying the title, on the final execution of the contract.

[3] It may be conceded that ordinarily the payment of the purchase price and acceptance of a deed to land, after approval of title by the purchaser, thus effecting an executed contract, precludes him from rescinding or recovering the purchase money upon failure of his title. (*Bryan v. Swain*, 56 Cal. 616; *Frederick v. Youngblood*, 19 Ala. 680, [54 Am. Dec. 209].)

[4] On the other hand, it is the general rule, in case of an executory contract, that there is an implied agreement on the part of the vendor to convey a merchantable title, and failure to do so on demand and upon tender of final payment is a breach of the contract which justifies rescission and recovery of the money paid by the purchaser. (*Backman v. Park*, 157 Cal. 607, [137 Am. St. Rep. 153, 108 Pac. 686]; *Crim v. Umbesen*, 155 Cal. 697, [132 Am. St. Rep. 127, 103 Pac. 178]; *Sanders v. Lansing*, 70 Cal. 429, [11 Pac. 702]; *Winkler v. Jerrue*, 20 Cal. App. 559, [129 Pac. 804]; *Flinn v. Barber*, 64 Ala. 193; *Eggers v. Busch*, 154 Ill. 604, [39 N. E. 619].)

This distinction between the rights of the purchaser under executed and executory contracts is plainly stated in *Bryan v. Swain*, *supra*. In that case plaintiff entered into an agreement with defendants by the terms of which he agreed to sell defendants certain parcels of land. The deed was to be a good and sufficient one to convey the title free from all encumbrances and was to be executed and delivered when full payment of the purchase money was made. A grant, bargain, and sale deed was executed and delivered by plaintiff to defendants and a note and mortgage was taken for the unpaid purchase price. This completed the transaction as an executed contract. Title to one of the tracts covered by the contract and deed had never vested in the grantor. This was pleaded as a defense to an action to recover on the mortgage. Chief Justice Morrison,

writing the opinion for this court, says: "There can be no doubt that the plaintiff was obliged, under the agreement, to execute a good and sufficient deed, conveying the title; and if this case depended upon such agreement, the matter pleaded would be a good defense to the action. But the finding of the court is, that the deed was taken and accepted in execution of the contract. . . . The rights of the defendants, therefore, depend upon the deed, and not upon the agreement, the latter being merged in and extinguished by the former."

It was further held in the case cited that the deed having been accepted in execution of the agreement, the defendants must look to its covenants for a defense to the action.

But there, as here, the deed was one of grant, bargain, and sale, and the only covenant was the implied covenant that the grantor had not previously conveyed the premises, and that they were free from all encumbrances made or suffered by him (Civ. Code, sec. 1113), and, there as here, there was no breach of such implied covenant to which the purchaser could resort for relief.

[5] Appellant, in the case before us, demands the application here of this rule of an executed contract, on the theory that the placing in escrow of a deed to the premises was a complete execution of the contract on the part of the vendor; that there was no further act for him to perform, and that the only condition to the delivery of the deed was the payment of the balance of the purchase price, and that the acceptance of the contract and execution of the escrow after the stipulated time for examining title was a waiver of all objection to the title.

Was the escrow deposit of this deed, for delivery upon payment of the balance of the purchase price, an execution of the contract to convey? In the first place, there was no mutual contract between the parties prior to the escrow. All that the agreement executed in the first instance by the defendant amounted to was an option giving the plaintiff the privilege to purchase on specified terms at the end of a specified period if he was satisfied, from an examination of the title, to proceed with the deal. His refusal for any reason to proceed further could only have subjected him at most to the loss of the one hundred-dollar initial payment. It was only when, after he expressed himself as satisfied,

paid the one thousand five hundred dollar installment of the purchase price, and the deed and escrow agreement were executed by defendant and ratified by the plaintiff, that a mutual contract of purchase and sale was perfected. Then it was that the original option and offer of defendant became a contract of purchase and sale, and the nature and terms of such contract are evidenced by the escrow agreement signed by defendant and accepted over the signature of plaintiff.

The deed was an ordinary grant, bargain, and sale deed, without express covenants.

The escrow paper was as follows:

“California Safe Deposit & Trust Company,

“San Francisco, Cal.

“Gentlemen:

“There is herewith delivered to you a deed of conveyance dated August 2nd, 1906, from the undersigned, Richard White, as grantor, to Joseph Craig, as grantee, embracing Lake Shore lands in Lake County, California, which deed is placed in escrow with you and is to be held by you and delivered to said grantee, his heirs or assigns, upon the condition that he shall pay, and when he or they shall have paid to you for account of the undersigned, or his heirs or assigns, the sum of fourteen thousand and four hundred dollars (\$14,400.00) in United States gold coin, at the time and in the manner following, to-wit: Sixteen hundred dollars (\$1600.00) on or before the second day of August, 1907, and a like sum on or before the second day of August of each year thereafter until the said sum of fourteen thousand and four hundred dollars (\$14,400.00) is paid. Together with interest upon all of the said deferred payments at the rate of three per cent (3%) per annum from August 2nd, 1906, until paid, interest payable annually at the same time as the payments of the principal installments as above.

“The whole unpaid balance may be paid at any time and if the same shall be paid within three years after the 2nd day of August, 1906, all interest which shall have been actually paid shall in that event be credited upon the principal, and considered as having been paid on that account and not as interest.

“If the said grantee, his heirs or assigns, shall fail to make payment of any of such installments at or before maturity,

or within thirty days thereafter, he or they shall forfeit all right to have a delivery of the said deed, and shall forfeit all right to the moneys which may have been paid, and the said deed shall be re-delivered to the undersigned, his heirs or assigns, free from all claims or rights of the said grantee, his heirs or assigns.

“Witness my hand at San Francisco, California, this 3rd day of August, A. D. 1906.

“RICHARD WHITE.

“I accept the terms of the within conditions.

“J. CRAIG.”

This transaction does not on its face constitute an executed conveyance such as to merge the implied agreement of the contract to convey a good title into the covenants of the deed, as indicated in *Bryan v. Swain*, *supra*.

The placing of the deed in escrow did not make it an executed instrument. There had been no delivery to the purchaser, no transfer of title. (Civ. Code, sec. 1057; 3 Washburn on Real Property, 586; *Whitney v. Sherman*, 178 Cal. 435, [173 Pac. 931].) It is said by this court (*Fitch v. Bunch*, 30 Cal. 212), that “An escrow differs from a deed in one particular only, and that is the delivery”; but the lack of delivery is a very essential omission to the consummation of a conveyance. It will not be questioned that the failure of a grantor’s title pending the delivery of an escrow deed would support a rescission by the vendor, unless the deed itself and not the title was the subject of the agreement between the parties. The same result follows when such title has failed prior to the escrow; because the agreement, express or implied is that the escrow deed will convey title under the same conditions. In this case the implied agreement for title remained executory. The contract to convey a good title was independent of the escrow itself. That was but one of the steps toward the consummation of the contract, the final one on the part of the vendor, it is true, but not such as to satisfy the contract until its delivery.

We have been referred to no authority which holds that mere opportunity to investigate title before entering into a contract of purchase, and the implied approval of the title offered by subsequently entering into the contract, constitutes a waiver of the obligation of the vendor to furnish

title on tender of the final payment. The fact of inspection and approval by the plaintiff here of the deed offered for escrow has no significance, because the deed itself was regular on its face and purported to convey the title to the land contracted for.

[6] An examination and acceptance of an imperfect title precedent to entering upon a contract to purchase, by express agreement or under circumstances giving substantial advantage to the purchaser, or operating to the detriment of the vendor, might operate as an estoppel.

But even an express agreement to buy and pay for land to which it was known the vendor had no title whatever would be void for want of consideration.

Here there is no claim of an express waiver, and there are no circumstances to sustain an equitable estoppel of the purchaser.

It is entirely clear that both parties contracted on the belief that the defendant had and could convey title to the land. The plaintiff, although it does not so appear of record, presumably made some search or inquiry. The record title appeared to be in defendant. The plaintiff, by entering upon the contract to purchase, impliedly, at least, expressed himself as satisfied that the title was good. We are of the opinion that this did not preclude him from rescinding while the contract was still executory, and not merged in an executed and delivered deed of conveyance, when he discovered that the defendant had no title whatever and could not make such conveyance.

[7] As is said in Ruling Case Law (27 R. C. L., p. 908), "To constitute a waiver within the definitions given, it is essential that there be an existing right, benefit or advantage; a knowledge, actual or constructive, of its existence, and an intention to relinquish it. No man can be bound by a waiver of his rights, unless waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them." And again: "In the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to."



It can hardly be seriously contended in this case that the defendant was impressed by anything the plaintiff said or did, with a belief that the latter intended to accept an entirely inoperative deed in satisfaction of his contract.

[8] There was no laches in failing to give notice of rescission before the time had arrived for final payment and delivery of the deed, because the defendant had until such time to make his title good, and it could not appear until the judgment was given in the attack upon defendant's title that he would be unable to do so. The vendor is not in default in such contract if he is able to furnish title when the conveyance is due (*Bachman v. Park, supra; Hanson v. Fox*, 155 Cal. 106, [132 Am. St. Rep. 72, 20 L. R. A. (N. S.) 338, 90 Pac. 489]; *Garberino v. Roberts*, 109 Cal. 125, [41 Pac. 857]; *Easton v. Montgomery*, 90 Cal. 307, [25 Am. St. Rep. 123, 27 Pac. 280]). And it was not incumbent on plaintiff to tender his final payment so as to enable him to make demand for a conveyance of title before the final payment was due.

Appellant places strong reliance upon the decision in the case of *Sage L. & I. Co. v. McCowen*, 30 Cal. App. 126, [57 Pac. 244], in support of his contention that there was a waiver of objections to invalidity of title.

In that decision of the court of appeal of the third district, in an opinion by Mr. Justice Burnett, it was held that, upon the examination of title by vendee under an executory contract to purchase, failure to point out defects constituted a waiver. We think, as pointed out by the district court of appeal, there is a material distinction between that case and this. In the case cited the purchasers did point out the defect in the title they were contracting for and expressly agreed in writing to accept it on specified conditions.

In the first place, the purchasers were furnished an abstract and given thirty days thereafter to make an examination, and report defects, the vendor agreeing to clear such defects within a reasonable time. Title to part of the land was approved and accepted and deeds of conveyance made and delivered. As to part of the land, certain defects were pointed out, and ostensibly cured in a suit to quiet title brought by the vendor. The only remaining objection was that one defaulting defendant served by publication was entitled under the law to appear within one year and contest

the proceedings. A deed to this property was placed in escrow under the express agreement of the purchaser that if the defaulting defendant did not appear within the year the deed would be accepted. No such appearance was made, but the purchaser discovered other defects in the title; but, under the state of facts indicated, it was held that grounds of objection other than that specified in the agreement were waived.

This is not contrary to the doctrine we have set out in this opinion. In this case we hold there was no express waiver, and no facts to support an equitable estoppel to plead a failure of title.

The judgment is affirmed.

Lennon, J., Wilbur, J., Shaw, C. J., Shurtleff, J., and Waste, J., concurred.

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[L. A. No. 6787. In Bank.—December 9, 1921.]

LEWIS M. OBERKOTTER, Appellant, v. CLAUDE  
WOOLMAN, Respondent.

[1] APPEAL—NOTICE—DATE OF ENTRY OF JUDGMENT—INCORRECT RECITAL.—An appeal from a judgment of dismissal after the sustaining of a demurrer to the complaint without leave to amend is not open to the objection that the appeal was taken from the order sustaining the demurrer, and not from the judgment, because the notice incorrectly recited the date of the entry of the judgment as being the date on which the demurrer was sustained, where but one judgment was entered and the notice gave the correct book, page, and date of entry thereof.

[2] SLANDER—PLEADING—SUFFICIENCY OF COMPLAINT.—In an action for slander the complaint states a cause of action where it alleges that plaintiff is a skilled teacher, that defendant stated to a newspaper reporter, knowing and intending that the statement would be given further circulation through the public press, that plaintiff was to be dropped from the staff of city school-teachers for the reason that the city superintendent considered his position as it existed "a weak spot in the public school system of instruction," that such statement was false, malicious, and unprivileged, and

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2. Sufficiency of complaint in action for slander as to averments of publication, note, *Ann. Cas.* 1918B, 504.

.that the defendant thereby publicly accused plaintiff of being unfit and incompetent to be employed in his profession.

[3] **ID.—DEFINITION OF OFFENSE.**—Slander is a false and unprivileged publication, other than libel, which tends to directly injure one in respect to his office, reputation or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit, or which by natural consequence causes actual damage.

[4] **ID.—GENERAL AND SPECIAL DAMAGES—PLEADING.**—In an action for slander a sufficient allegation of general and special damages is made by the averment that the false, malicious, and unprivileged publication by the defendant exposed plaintiff to hatred, contempt, ridicule, and obloquy, and was made by the defendant to so expose him, and that by reason of the slander plaintiff has suffered great mental anguish, and has been, and is, and from henceforth will be greatly injured and prejudiced in his reputation as a school-teacher, and has lost and will continue to lose and be deprived of great gains and profits which would otherwise have accrued to him in his calling, occupation and profession.

[5] **ID.—AMENDMENT OF COMPLAINT—STATUTE OF LIMITATIONS.**—An action for slander is not barred by section 340 of the Code of Civil Procedure by reason of the amendment of the complaint after the expiration of the period provided by such section, where the original complaint was filed within time, and the only difference in the two statements of the cause of action was that in the original complaint it was asserted that defendant knowing and intending that the words would be published in a newspaper communicated them to a reporter, and they were so published, the article, quoting the words being given in full, while the amended complaint alleged that the false and unprivileged communication was made to the same party, the defendant knowing and intending that it would be given further circulation through the public press, the exact words being set out.

APPEAL from a judgment of the Superior Court of San Diego County. T. L. Lewis, E. A. Luce and C. N. Andrews, Judges. Reversed.

The facts are stated in the opinion of the court.

Wynne S. Staley and Marcus W. Robbins for Appellant.

Stephen Connell and Richard M. Kew for Respondent.

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4. Right to recover damages for mental or physical suffering in actions for libel and slander, note, *Ann. Cas.* 1914C, 291.

WASTE, J.—The plaintiff brought this action to recover damages from the defendant for alleged slander. The demurrer to the second amended complaint was sustained without leave to amend. Judgment dismissing the action followed, from which judgment this appeal was taken.

[1] The respondent makes a preliminary objection and seeks a dismissal of the appeal upon the ground that it was taken from the order sustaining the demurrer, which is not appealable. The notice of appeal states that the plaintiff appeals from the judgment rendered on the twenty-seventh day of September, 1920. While the court sustained the demurrer on that date, the judgment of dismissal was not made until September 29th. It is this discrepancy upon which the respondent relies. Since it clearly appears that but one judgment was entered in the case, the defect is one which would not invalidate the appeal were there no further reference to the judgment (*Wilson v. Union Iron Works Drydock Co.*, 167 Cal. 539-541, [140 Pac. 250]), but the notice of appeal gives the correct book, page, and date of the entry in the judgment records of the court. There is no merit in the objection.

[2] The demurrer, which interposed the general ground of want of sufficient facts and the bar of the statute of limitations, should have been overruled. It is alleged in the complaint that the plaintiff was, and is, a teacher in colleges, academies, and graded schools, having the requisite skill and qualifications proper and necessary for the practice of his profession. He had always conducted himself with diligence, industry, and propriety, and had acquired and was acquiring gain and profits from the pursuit of his calling. At the time of the alleged slander he was the principal of one of the public schools of the city of San Diego. The defendant, who is alleged to have great influence by reason of his wealth, standing, and an official position, the exact nature of which is not clearly stated, intending to bring the plaintiff into public contempt, infamy, and disgrace among his neighbors and citizens generally, particularly all persons interested in the cause of public education in San Diego and other portions of the United States, and to cause it to be believed that the plaintiff was a person of bad character, and unfit and unqualified to be employed in his calling, business, and profession, and to cause the plaintiff

to be deposed, and lose his employment, and to be deprived of his livelihood, and to prevent plaintiff from being employed as teacher, said and uttered to a reporter of a newspaper published in San Diego certain slanderous, unprivileged, and uncalled-for statements, knowing and intending that the same would be given further circulation through the public press of San Diego and elsewhere. The statement was as follows:

"We are going to drop at least three principals and one department head of the high school from the staff of city school-teachers at the close of the current school year. These are Williams D. Edwards, principal of the Brooklyn; Archibald M. Fosdick, principal of the Florence, and Lewis M. Oberkotter, principal of the Grant, and W. S. Staley, in charge of the Commercial department of the high school. These changes have been recommended to the school board by principal Guy V. Whaley for the reason that he considers these positions as they exist, weak spots in the public school system of instruction."

It is further alleged in the complaint that the charges and words uttered by the defendant were false, malicious, and unprivileged, so far as this plaintiff is concerned, and that the defendant thereby publicly accused the plaintiff of being unfit and incompetent to be employed in his profession as teacher, and intended to and did assert that he was not a fit and proper person to teach in the public schools of San Diego, or elsewhere. Thus construed, the complaint states a cause of action. (*Ingraham v. Lyon*, 105 Cal. 254-257, [38 Pac. 892]; *Schomberg v. Walker*, 132 Cal. 224-227, [64 Pac. 290]; *Frolich v. McKiernan*, 84 Cal. 177, 180, [24 Pac. 114].) [3] Slander, under our law, as applied to the facts of this case, is a false and unprivileged publication, other than libel, which tends to directly injure one in respect to his office, profession, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit, or which by natural consequence causes actual damage. (Civ. Code, sec. 46, subds. 3 and 5.) Tested by this provision of the law, we think the accusation of the defendant that the plaintiff was about to be dropped from the staff

of city school-teachers of the city of San Diego for the reason that the city superintendent considered him a "weak spot in the public school system of instruction," tended naturally, necessarily, and proximately to produce one, at least, of the results mentioned in section 46 of the code, in that it imputed to plaintiff "a general disqualification" in those respects which the profession of teaching peculiarly requires. (*Swan v. Thompson*, 124 Cal. 193, 199, [56 Pac. 878]; *Tonini v. Cevasco*, 114 Cal. 266, 273, [46 Pac. 103]; *Bettner v. Holt*, 70 Cal. 270, 275, [11 Pac. 713].)

[4] The plaintiff also alleges that he has suffered actual damages. He avers that the false, malicious, and unprivileged publication by the defendant exposed him to hatred, contempt, ridicule, and obloquy, and were made by the defendant to so expose him, and that by reason of the slander he, the plaintiff, has suffered great mental anguish and has been, and is, and from henceforth will be, greatly injured and prejudiced in his reputation as a school-teacher, and has lost, and will continue to lose and be deprived of, great gains and profits which would otherwise have accrued to him in his calling, occupation, and profession, to his damage in the sum of fifty-five thousand dollars. The prayer of the complaint is for actual damages in that amount and for punitive recovery as well. Here was a sufficient allegation of general and special damages which, if proved, would entitle the plaintiff to recover. (*Turner v. Hearst*, 115 Cal. 394, 399, [47 Pac. 129].) It requires no argument to show that the complaint, read as a whole, constitutes a cause of action. (*Waite v. San Fernando Pub. Co.*, 178 Cal. 303, 306, [173 Pac. 591].)

[5] The respondent contends that the plaintiff's original complaint is one for libel; that the second amended complaint, filed more than one year after the making of the statement by the defendant, sets up a new cause of action, to wit, slander, which is barred by section 340 of the Code of Civil Procedure, which provides that an action for slander must be commenced within one year after the alleged utterance. There is nothing in the contention. The only difference in the two statements of the cause of action lies in the fact that in the original complaint it is asserted that the defendant, knowing and intending that the false and malicious words would be published in a certain newspaper, communicated them to a reporter of that paper, and they

were so published, the article quoting the words of the defendant being given in full, while in the second amended complaint it is alleged that the false and unprivileged communication was made to the same party, the defendant knowing and intending that it would be given further circulation through the public press, the exact words of the defendant being set out. As finally amended the complaint did not materially, or at all, change the cause of action. (*Frost v. Witter*, 132 Cal. 421, 425, [84 Am. St. Rep. 53, 64 Pac. 705].) It has at all times been one based on slander. (Civ. Code, sec. 46.)

For the foregoing reasons the demurrer to the second amended complaint should have been overruled.

The judgment is reversed, and the cause is remanded to the lower court with instructions to overrule the demurrer to the second amended complaint, with a reasonable time accorded to the defendant within which to answer.

Shaw, C. J., Lennon, J., Richards, J., *pro tem.*, Sloane, J., Wilbur, J., and Shurtleff, J., concurred.

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[S. F. No. 8936. In Bank.—December 9, 1921.]

EVA TORR, Appellant, v. UNITED RAILROADS OF SAN FRANCISCO (a Corporation), Respondent.

[1] NEGLIGENCE—PERSONAL INJURIES—DECREASED EARNING CAPACITY—UNSUPPORTED FINDING—INADEQUATE DAMAGES.—In this action for personal injuries, the finding that plaintiff did not lose any amount whatever by reason of the injuries which she would have earned at her profession of teaching if the injuries had not been sustained is held to be unsupported by the evidence, and the judgment is held to be wholly inadequate to compensate the plaintiff for her decreased earning capacity.

[2] *Id.*—MEASURE OF DAMAGES—ERRONEOUS VIEW OF LAW.—While the trial court has almost unlimited discretion in fixing and determining the damages for pain and suffering and permanent injury, yet where the actual loss of earning capacity exceeds the total award for all cases, it will be concluded that the court acted upon an erroneous view of the law as to the measure of damages.



- [3] **ID.—INADEQUATE DAMAGES—REVERSAL OF JUDGMENT.**—Where it is manifest under the express findings of the court, and the creditable and uncontradicted evidence in explanation thereof, that the allowance of damages is grossly inadequate to compensate for the injury due to decreased earning capacity, the judgment will be reversed.
- [4] **ID.—APPEAL—REVERSAL OF JUDGMENT.**—A judgment in favor of the plaintiff in an action for personal injuries is an entirety, and the appellate court cannot reverse the portion of the judgment fixing the amount and affirm the portion fixing the liability of the defendant.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Reversed.

The facts are stated in the opinion of the court.

J. J. Dunne for Appellant.

Wm. M. Cannon, Wm. M. Abbott and Kingsley Cannon for Respondent.

**WILBUR, J.**—The plaintiff having been injured September 23, 1910, by the negligence of the defendant in starting its street-car while she was alighting therefrom, brought this action May 24, 1911, to recover \$21,214 for the injuries alleged to have been received by her. The case was tried by the court without a jury on July 2, 1915. Findings of fact were made on December 24, 1915, and judgment was rendered December 27, 1915, in plaintiff's favor for \$1,100, \$550 of which was for medical services and surgical appliances and \$550 for other damages. Plaintiff, being dissatisfied with the amount of the judgment, moved for a new trial, and, upon her motion being denied, March 30, 1916, appealed to this court from the judgment and order denying the new trial.

The court found her injuries to be as follows:

“Her right arm was sprained, her left innominate was displaced; her spine was injured and she sustained a severe

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3. Inadequacy of verdicts in actions for personal injuries other than death, note, **L. R. A.** 1915F, 491.

What is excessive verdict in action for personal injuries not resulting in death, notes, **Ann. Cas.** 1913A, 1361; **L. R. A.** 1915F, 30.

nervous shock. Said injuries rendered plaintiff sick and caused her to suffer pain and mental suffering. The court finds, that said injuries to said innominate and said spine are permanent in their nature.

“3. That by reason of said injuries plaintiff was obliged to and did employ the services of physicians and surgeons to treat her, thereby incurring an indebtedness and expense in the sum of \$325, and expended \$106.50, making a total of \$431.50, which sum was and is the reasonable value of the services so rendered by said physicians and surgeons in the treatment of said injuries; and was obliged to and did expend the sum of \$35 for medicines and liniments, which sum was and is the reasonable value thereof; and was obliged to and did expend the sum of \$6 for arch braces for her feet, the further sum of \$6.75 for special shoes, and the further sum of \$18.00 for corsets, garters and straps, which sums were and are the reasonable value of said articles; and was obliged to and did expend the sum of at least \$52.75 for massage treatments in treating said injuries, which sum was and is the reasonable value of the services rendered in giving such massage treatments.

“4. That at and prior to the date of said injuries, plaintiff was a school teacher by profession, and then was, and prior thereto had been earning as said school teacher, a salary in the sum of \$120 a month; *that plaintiff did not lose any amount whatever, by reason of said injuries, which she would have earned at her said profession if said injuries had not been sustained.*

“5. That by reason of said injuries, and the pain and suffering endured by plaintiff therefrom, in addition to said sum hereinabove set forth, plaintiff has sustained damages in the sum of \$550.” (Italics ours.)

The direct and cross-examination of the witnesses who testified with reference to plaintiff's injuries cover over 250 pages of the transcript, and it would, therefore, be impossible to discuss the evidence in detail within the reasonable limits of an opinion. All of these witnesses, with the exception of one physician, Dr. B. F. McElroy, called by the defendant as an expert, testified on behalf of the plaintiff. Dr. B. F. McElroy was one of the physicians and surgeons of the defendant company. He had made no examination of the plaintiff and did not testify with

reference to her condition. His testimony was directed to the proposition that the injuries complained of by the plaintiff might not be the result of the accident, but might result from flat feet caused by her occupation or from other causes. The court, however, found that the injuries to plaintiff's spine and hip were caused by the accident and by the finding that all the expenses for medical attendance incurred by her were the result of the accident evidently disregarded the testimony advanced by this physician to the effect that her difficulties might have been due to other causes.

There is no conflict in the testimony of the plaintiff's witnesses as to the nature and character of the injuries received by her, or as to her condition before and after the injury. All agree that before the accident plaintiff was a high school teacher in normal health and in full physical and mental vigor, with good endurance. That at all times after the accident her face showed signs of suffering, she looked ill, her demeanor changed, and she was often moved to tears over trivial matters and complained constantly of suffering great pain. Her walk and carriage were affected, she dragged one foot slightly, she carried her head twisted to one side and the degree of motion of the spine was considerably limited.

[1] The plaintiff was entitled to recover for her decreased earning capacity due to her injuries. (*Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, [66 Pac. 72]; *Kline v. Santa Barbara etc. Ry. Co.*, 150 Cal. 741, [90 Pac. 125]; *Campbell v. Bradbury*, 179 Cal. 364, [176 Pac. 685].) The trial court found that the earning capacity of the plaintiff was \$120 a month, but also found "that plaintiff did not lose any amount whatever, by reason of said injuries, *which she would have earned at her said profession if said injuries had not been sustained.*" (Italics ours.) This finding is not supported by the evidence. The plaintiff testified that she was unable to teach school for long periods of time and that she did not teach school because she was unable to do so. Plaintiff contends that her earning capacity was reduced from one thousand two hundred dollars per annum to two hundred dollars per annum, and that during the five years preceding the trial she had actually suffered a loss of five thousand dollars because of her inability to work. For one year immediately before the trial she did not work as a school-

teacher and was unable to do much of anything. She practically earned nothing. It is evident that the plaintiff lost from this source alone much more than was allowed her for all her injuries. The court seems to have been of the opinion that her failure to secure employment was not due to her injuries. While, as we have said, this finding is not sustained by the evidence, if we assume that the fact is as found by the court, that she did not lose any employment in her profession as a teacher because of her injuries, it was still the duty of the defendant to compensate her for her loss of time, and decreased earning capacity. The court found that she was sick as a result of the accident. Plaintiff testified that she was ill for months. At one time she was ill for four months and unable to teach. If this is true she should have been allowed \$480 for this loss. She testified that at another time she was in bed for several weeks; that she spent Thanksgiving and Christmas vacation in bed; that from the spring of 1913 to the time of the trial, almost two years, she was unable to teach school and that she had earned almost nothing during that period.

In the face of this testimony the allowance by the court for all her injuries was barely sufficient to pay her for the time lost in going to and from her physician's office, and not enough in all to compensate her for the time lost while she was sick in bed. It is clear that the compensation awarded the plaintiff was wholly inadequate.

We purposely refrain from expressing a conclusion as to the amount due plaintiff because of her decreased earning power, and for her loss of time and employment and her two permanent injuries and the attendant pain and mental anxiety; that is a matter to be determined on a new trial. It is enough for us to say that the judgment is wholly inadequate to compensate plaintiff for the injuries found by the court to have been suffered by her, and established by uncontradicted and overwhelming proof. [2] We have not overlooked the fact that the trial court has almost unlimited discretion in fixing and determining the damages for pain and suffering and permanent injury, but where the actual loss of earning capacity exceeds the total award for all causes, we must conclude that the court acted upon an erroneous view of the law as to the measure of damages. It is not contended that the judge was actuated by passion

or prejudice, but we are not limited to a consideration of results arising from such causes. [3] Where it is manifest that under the express findings of the court, and the creditable and uncontradicted evidence in explanation thereof, that the allowance of damages is grossly inadequate to compensate for the injury due to decreased earning capacity, we will reverse the judgment, just as we would if the trial judge had rendered a judgment for nine hundred dollars on a promissory note of one thousand dollars. The court having determined the legal responsibility of the defendant, and having found the nature and extent of the injuries and the effect of such injuries being disclosed by the uncontradicted evidence upon which the finding is based, we have the simple case of a legal obligation of the defendant established in an amount in excess of that allowed by the trial court to compensate for the loss. [4] The plaintiff asks to have us reverse only that portion of the judgment fixing the amount and affirm that portion fixing the liability of the defendant. This may not be done. The judgment is an entirety and the case should be retried.

Judgment reversed.

Sloane, J., Shurtleff, J., Waste, J., Shaw, C. J., and Lennon, J., concurred.

Rehearing denied.

All the Justices concurred, except Lawlor, J., who was absent.

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[S. F. No. 9694. In Bank.—December 9, 1921.]

COLBERT COLDWELL, Petitioner and Appellant, v.  
BOARD OF PUBLIC WORKS, etc., et al., Defendants  
and Appellants.

[1] PUBLIC RECORDS—PRELIMINARY ESTIMATES AND DETAILS OF MUNICIPAL WATER SUPPLY SYSTEM.—HETCH HETCHY PROJECT OF SAN FRANCISCO — CHARACTER OF DOCUMENTS AND DATA BEFORE APPROVAL BY CITY ENGINEER.—The preliminary estimates, plans, drawings, maps, and other data prepared by the assistants and

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1. Right to inspect public records relating to public contracts, notes, 27 L. R. A. 82; 41 L. R. A. (N. S.) 280.

subordinates of the city engineer of the city and county of San Francisco for submission to him for his approval in connection with the acquisition and construction of the municipal water supply system, known as the Hetch Hetchy project, of which project the engineer is in charge as an officer of the board of public works, are not, before official approval, "public records in the office of an officer" open to inspection by any citizen of the state, within the meaning of sections 1888, 1892, 1893, and 1894 of the Code of Civil Procedure, section 1032 of the Political Code, and section 6 of chapter 1 of article VI and section 13 of article XVI of the charter of the city and county of San Francisco.

- [2] **ID.—RIGHT OF INSPECTION AS "OTHER MATTERS" IN OFFICE OF PUBLIC OFFICER—CONSTRUCTION OF SECTION 1032, POLITICAL CODE.** The preliminary estimates and details prepared by the assistants and subordinates of the city engineer of the city and county of San Francisco for submission to him for his approval in connection with the Hetch Hetchy project are, before approval, of such character as constitutes them "other matters" within the meaning of section 1032 of the Political Code, which provides that the public records and other matters in the office of any officer are at all times, during office hours, open to the inspection of any citizen of the state.
- [3] **ID.—CONFIDENTIAL CHARACTER IMMATERIAL.**—The right of a citizen under section 1032 of the Political Code to inspect preliminary estimates and details in connection with the acquisition and construction of a municipal water supply system as "other matters in the office of any officer" is not affected by the fact that the engineer had communicated them to the city attorney as confidential matter in pending and anticipated litigation affecting the project.
- [4] **ID.—INSPECTION BY CERTAIN CITIZENS — WAIVER OF PRIVILEGED CHARACTER.**—Where preliminary estimates and details in connection with the acquisition and construction of a municipal water supply project were permitted by the city engineer to be inspected by some citizens, the right of other citizens to inspect cannot be refused on the ground that the matter was of a confidential character.

APPEALS from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a motion to vacate the judgment and amend the conclusions of law. George E. Crothers, Judge. Judgment modified and affirmed.

The facts are stated in the opinion of the court.

Robert Gaylord for Petitioner and Appellant.

George Lull and Robert M. Searls for Defendants and Appellants.

LAWLOR, J.—This is an appeal by both petitioner, Colbert Coldwell, and defendants, the board of public works of the city and county of San Francisco, the individual members thereof, and M. M. O'Shaughnessy, the city engineer, from a judgment granting, with certain exceptions, a petition to the superior court of the city and county of San Francisco for a writ of mandate to compel the defendants to allow petitioner to view and take copies of certain documents and data in the office of the city engineer of the city and county of San Francisco, and by the petitioner from an order of the court denying petitioner's motion to vacate and set aside the judgment entered and to amend the conclusions of law contained in the court's findings. As the same questions are involved in both appeals, they may be considered together.

The petition alleged that the city and county of San Francisco was engaged in the acquisition and construction of a municipal water supply with engineering works at Hetch Hetchy, in the state of California; that in connection with the Hetch Hetchy project the board of public works and M. M. O'Shaughnessy as city engineer had done a large amount of work; that the board of public works had in its possession a large number of plans, specifications, reports, contracts, estimates, certificates, receipts, surveys, field-notes, maps, plats, profiles, and other papers relating to the Hetch Hetchy project, which included records of certain specified structures, drill borings, and a proposed section of the dam; that petitioner, a citizen of the city and county of San Francisco, desired to inform himself and others with regard to the work; that he desired to investigate the records of the Hetch Hetchy project, including both those generally described and those specifically described; that he had made demand on the defendants that he be given access to and inspection of the records mentioned, which demand had been refused; and petitioner prayed that defendants be ordered to allow petitioner to inspect all the records mentioned, with



the privilege of taking notes, copies, and other data therefrom.

In their answer, the defendants alleged that "there are in the office of the City Engineer, a large number of incompleated and unapproved maps, plans, estimates, studies, reports, and memoranda relating more or less directly to the Hetch Hetchy project, some of which have been prepared or are in the course of preparation by the City Engineer's assistants, some of which have been left there by employees of previous administrations, but none of which have been finally approved by the City Engineer or filed with the Board of Public Works or made a part of any public or official transaction. As to the last described maps, plans, estimates, studies, reports and memoranda, defendants allege that the City Engineer has not had the opportunity of passing on such data either in the way of approval or disapproval; that as at present constituted, said data is of the kind and type which may be modified, corrected or destroyed at the will of the City Engineer or the assistant in charge of the same; that they have not been made the basis of and are not records of any public or official acts or transactions; that they are not public records, public books, public writings, public documents or public matters; that the interests of the public and the Hetch Hetchy project require that said data be kept and withheld from inspection by the petitioner or his agents"; and denied that "until the City Engineer completes, approves, and files said data or other matter with the Board of Public Works, that the same passes into the possession, custody, or control of the Board of Public Works, or becomes a part of any public record whatever. Defendants deny that they, or either or any of them have ever refused or still refuse to petitioner or his representatives or agents access to that portion of the hereinabove described data which is a matter of public record, and allege that all such data or matter which constitutes part of the public records of the City and County of San Francisco has at all times been, and is still open to said petitioner."

Then followed certain allegations that it was necessary to keep private the information concerning the work on the Hetch Hetchy project until the plans for it had been approved, and impugning the motives of petitioner in seeking

the information he wanted, and that "part of the data in the City Engineer's office to which access is sought by petitioner consist of confidential reports, estimates and data collected and compiled by assistants and other engineers employed for that purpose, and held for use in pending litigation and investigations affecting the Hetch Hetchy project; that it would be extremely detrimental to the interests of said project and the interests of the people and citizens of the City and County of San Francisco if such data should be given publicity"; and that in refusing inspection of the data asked by petitioner, defendant city engineer was acting under authority and instruction from the board of supervisors of the city and county of San Francisco.

The court found that all the allegations of the petition were true, except those of paragraph X, which concerned the making of a demand for inspection by petitioner, his agents and representatives. In that connection the court found in detail that petitioner had demanded of defendants that he, his agents and representatives, be given access to and inspection of all the records mentioned, with the privilege of taking copies, notes, and data therefrom, but that the defendants had refused such demand, except that petitioner had been accorded the right to inspect the detailed specifications of the tunnel aqueduct between Early Intake and Moccasin Creek, including the record of certain drill borings and the city engineer's estimate thereon, and other records which defendants admitted constituted public records. It was also found that the purpose of the petitioner was not to mislead or prejudice the public mind against the Hetch Hetchy project, and that it was not the petitioner's motive to find in the records to which access was sought a basis for unfair or sinister criticism of the Hetch Hetchy project; that there were data consisting of confidential reports, estimates, and data prepared for use in pending litigation, which it would be detrimental to the interests of the people of the city and county of San Francisco to disclose prior to the time at which it would become necessary to use such data in connection with the litigation; that the city engineer had permitted all of the records and other matters mentioned in the petition to be examined by an investigating committee from the Civil League of Improvement Clubs, and that they had been examined by such committee; that the

board of supervisors had instructed the city engineer to refuse inspection to petitioner, as alleged in the answer.

The conclusions of law were to the effect that petitioner was entitled to a writ of mandate as prayed, "except that such writ shall not decree to said petitioner the right to inspect or take copies, notes or data from any of the confidential reports, estimates or data, collected or compiled by assistants or other engineers employed for that purpose for the use of the City Attorney of the City and County of San Francisco, or other attorney at law acting for said City and County, in advising the defendants in respect to their official rights and action or for use by said attorneys or either of them in legal proceedings . . . to which proceedings the defendants or any of them in their official capacity, or the City and County of San Francisco are or may be parties litigant; except further from said writ any advice given in reference to such privileged data by the City Attorney or other attorney in the course of his professional employment as attorney for said City and County of San Francisco, or for said defendants in their official capacities."

Defendants state: "We may summarize the description of this data by saying that it consists of maps, plans, estimates and studies in the possession and control of the City Engineer and his assistants upon which no official judgment or action had been taken at the date of the petition. It was and is defendants' contention that a public record is not made every time a public employee puts his pencil on paper; that it must be a record of some official act and not merely a tentative study or design concerning which no official action has been taken either in the way of approval or rejection"; that "The data to which access is sought is not required by law to be kept, has not been approved by the City Engineer, has not been filed with the Board of Public Works, has not been made a part or basis of any public transaction. For the most part it consists of preliminary maps lacking detailed drawings and working plans necessary to make it available for use even if officially approved and filed. The line of demarcation between public records and documents and data or memoranda in the course of preparation must, of course, be drawn somewhere,"

and that "The tentative conclusion of an assistant may or may not be correct, and until the city engineer finally passes upon it, it does not become a record of the opinion of his office."

Petitioner's contention is that "The fundamental issue on this appeal is not the right of these petitioners to inspect the Hetch Hetchy records. The question is whether the citizens of San Francisco, in their capacity as citizens and distinguished from their corporate entity, have a right to see these records, whether they have a right to go behind the conclusions of the City Engineer and whether they have the right to see the work for which their money was paid"; that "We believe that any document prepared in a public office within the scope of the duties of that office, for the purpose of conducting public business and the expense of which is borne by the municipality, belongs to the municipality; that it is a matter of public interest and that the citizens of the municipality by virtue of their citizenship are entitled to inspect that document and draw from it such conclusions as they choose. We submit that it is immaterial whether one branch of a particular department has transmitted the document to another or not, and that it is immaterial whether in the course of days or months or years, the head of the subordinate department has, or has not, seen fit to stamp it with his mental approval. It makes no difference whether it is a correct or erroneous document; it is a document which belongs to the public, and if it belongs to the public, the citizens have the right to inspect it," and that "The real rule, however, is that a document prepared by a public official or his subordinate in the course of duty and at public expense, is a public document and every citizen has the right to inspect it."

Section 1888 of the Code of Civil Procedure is as follows: "Public writings are: 1. The written acts or records of acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive. . . . 2. Public records, kept in this state, of private writings." Section 1892 provides that "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute," and section 1893 that "Every public officer having the

custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor." Section 1894 provides in part that "Public writings are divided into four classes: . . . 3. Other official documents; 4. Public records, kept in this state, of private writings." Section 1032 of the Political Code provides that "The public records and other matters in the office of any officer, are at all times, during office hours, open to the inspection of any citizen of this state."

Section 6 of chapter 1 of article VI of the charter of the city and county of San Francisco is as follows: "The Board [of public works] shall keep and preserve a record of all its proceedings, and copies of all plans, specifications, reports, contracts, estimates, certificates, receipts, surveys, field notes, maps, plats, profiles, and of all papers pertaining to the transactions of the Board." Section 13 of article XVI provides that "All books and records of every office and department shall be open to the inspection of any citizen at any time during business hours, . . . but the records of the Police Department shall not be subject to such inspection except permission be given by the Police Commissioner or by the Chief of Police."

On appeal the defendants waived the objection they made in the court below on the score of petitioner's motives, so even if the motives of a citizen have any place in the consideration of such a question, the point is eliminated here.

Although there is no express finding that all the documents to which access is sought are public records or "other matters" which the public is entitled to inspect, such a finding is to be implied from the conclusion of law that petitioner is entitled to inspect all of them, with the exception of those which were prepared for the use of the city attorney in litigation. An examination of the authorities shows that there is no single test which can be applied to determine what are and what are not "public records." In *Barrickman v. Lyman*, 155 Ky. 710, [160 S. W. 267], the distinction was held to rest on whether or not the documents were required by law to be kept; in the case of *Kyburg v. Perkins*, 6 Cal. 674, cited by petitioner, it was said that "To entitle a book to the character of an official register it is not necessary that it be required by an express

statute to be kept''; and, as pointed out, petitioner insists that all documents, prepared by public officials at public expense, are public documents. In *Musket v. Department of Public Service of the City of Los Angeles*, 35 Cal. App. 630, [170 Pac. 653], petitioner, a taxpayer, brought an action to compel the defendant department of public service to allow him to inspect certain books of account, records, papers, and documents connected with an electric heat, light, and power system which the city was operating. The inspection was allowed over the objection of defendants that the documents were not public records. In that case it was said: "The appellants, it is true, are by the charter of Los Angeles made officers of the municipality; but the books and papers which respondent seeks to examine are not made official documents merely because they are kept under the direction of city officials. Their character is fixed by the considerations which we have already advanced." The considerations advanced to determine whether or not the documents were public records were as follows: "Returning to the language of sections 1894 and 1888 of the code, it is plain that the books and papers mentioned in the petition are not described in either subdivisions 1, 2, or 4 of section 1894, or subdivision 2 of section 1888. If the sections cover them at all they must fall within the language of the one remaining subdivision of each; in other words, consolidating the language of those subdivisions, they must answer this description: They must be 'official documents' other than laws or judicial records, and must be the 'written acts or records of the acts . . . of official bodies' or 'tribunals' or 'of public officers . . . of this state.'" In that case it was held that the documents were public records, although the city in operating the electric system was engaging in a private enterprise as a proprietor. It appears from that case that the only means of deciding whether or not a document is a public writing is by determining whether or not it falls within the statutory definition.

In *Egan v. Board of Water Supply of the City of New York*, 205 N. Y. 147, [Ann. Cas. 1913E, 56, 41 L. R. A. (N. S.) 280, 98 N. E. 467], petitioner asked for and was allowed inspection of certain correspondence which would tend to show why the board had failed to grant a con-

tract to the lowest bidder. The court said in part: "It may not be denied that there are papers concerning governmental matters which are properly treated as secret and confidential, such, for example, as diplomatic correspondence and letters and dispatches in the detective police service."

In the case at bar the record shows that the city engineer, as an officer of the board of public works, is in charge of the Hetch Hetchy project, and that he is assisted by a large number of assistants and subordinates. These assistants prepare data connected with the project, which consist of estimates, plans, drawings, maps, or the like. These data are all submitted to the city engineer for his approval, unless a subordinate is formally appointed to take charge of a particular subject, in which case the subordinate's approval of the work is final. When an estimate of the plan is completed, which is considered acceptable, it is approved by the city engineer, and usually is at once forwarded to the board of public works. Defendants concede that after such approval the documents are public records. Until finally approved by the city engineer, with the exception noted, all the data are but tentative, and are liable to change, and much matter is destroyed when refused approval. It is this preliminary matter which defendants, as stated above, contend should not be submitted to public inspection. Defendants do not contend that surveys and maps, complete in themselves, of the territory which the project will affect are not open to public inspection. The data referred to here, consisting of preliminary estimates, plans, and the like, are computations based on such surveys.

[1] We are of the opinion that the preliminary estimates and details which form these incompleated data are not of such a character as would constitute them public records. Until they receive some official approval the documents cannot be considered the act or the record of an act of the city engineer or of the board of public works. They cannot be considered the official acts of the city engineer because they are compiled in his office, for he testified that "I don't allow anything to go out of my office except it has my final, definite approval." They have not attained the character and dignity of completed acts or documents of any kind until approved. Until a satisfactory plan or estimate is achieved, the documents are but preliminaries



to what will ultimately be an act of the city engineer. When a satisfactory plan is adopted, the tentative ones are discarded unless, as testified by the city engineer, they relate to the plan which is finally adopted, in which case they are included in the files with the accepted plan. Therefore, these preliminary matters are not "public records in the office of an officer," within the meaning of the sections of the codes and the charter.

[2] We are of the opinion, however, that these documents and data are of such a character as constitutes them "other matters" within the meaning of section 1032 of the Political Code. In *Whelan v. Superior Court*, 114 Cal. 548, [46 Pac. 468], petitioner sought to be allowed to inspect certain instructions given to a sheriff by an execution creditor. In refusing the inspection, the court said: "It does not by reason of being in writing, become a 'public record,' or any other public matter, in the office of the sheriff. The 'other matters' referred to in section 1032 [of the Political Code] which a citizen is entitled to inspect, is a matter which is 'public' and in which the whole public may have an interest." The word "public" is defined in both the Standard and Webster's dictionaries as "of, pertaining to, or affecting, the people at large or the community." That the Hetch Hetchy project is a public matter, in which the public has an interest, cannot be doubted. It follows that the public has an interest in the plans and designs which are adopted for the completion of the project. The preliminary specifications and estimates are all steps in the process of forming an acceptable plan for carrying out the work. Although many of them are never completed, and many are destroyed, they all represent work which is being done in the course of completing the project. Not only is the work being done in the course of completing a public project, but it is being done by public officers and employees at public expense. That these plans are tentative and are liable to error or alteration cannot change their character, for, while they may not represent the final result of the work of the city engineer's office, they are important details of that work. As such they are matters which affect the public, and in which the public has an interest, if that interest is only to see that the city engineer is taking steps toward the completion of

the Hetch Hetchy project. It must be held that the implied finding of the trial court that they are of such character was justified. It is, therefore, unnecessary to consider whether these documents are such as the board of public works is required to keep.

[3] As already stated, there was a finding to the effect that "There exists data in said City Engineer's office consisting of confidential reports, estimates, and data collected and compiled by assistants and other engineers employed for that purpose and held therein for use by the attorneys for said City and County of San Francisco in pending litigation and anticipated litigation affecting the Hetch Hetchy project," and that "defendant M. M. O'Shaughnessy, as City Engineer of said City and County of San Francisco, has permitted all of the records and other matters to which access is sought by the petitioner in this proceeding to be examined by an investigating committee appointed by the Civic League of Improvement Clubs of said City and County of San Francisco, and that the same have been examined by such committee." In support of that portion of the judgment which exempts from petitioner's right of inspection all these data, we are referred to subdivision 2 of section 1881 of the Code of Civil Procedure, which provides that "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of his professional employment," and to subdivision 5, to the effect that "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." The first of these provisions applies to the examination of an attorney as to communications made to him by his client. The right of the city attorney to refuse to testify, if he were examined concerning the documents under consideration here, is not involved. If the documents are public records or "other matters" which the public has a right to inspect, the fact that the city engineer had communicated them to the city attorney cannot prevent a citizen from inspecting them.

[4] In *Title Ins. & Trust Co. v. California Development Co.*, 171 Cal. 173, 220, [152 Pac. 452], it was said: "It is argued that the court erred in admitting in evidence certain letters written by and to officials and employees of the

Southern Pacific Company. While some of these communications were originally privileged, there was evidence justifying the court in concluding, in each case, that the privilege had been waived by voluntarily giving the letter into the hands of third persons." The record in the case at bar shows that the city engineer testified: "Q. You would have been willing to have any committee of the Civic League of Improvement Clubs go through all this data? A. I would, and they did. Q. And they did? A. And they did. Q. How long did it take them to go through it? A. They took part of one day and pretty nearly the whole of another. Q. Examined it quite exhaustively? A. Examined it quite exhaustively." This testimony sustains the finding that the city engineer has permitted this matter to be inspected. Since it has been opened to inspection it cannot be claimed it is any longer confidential, as was held in *Title Ins. & Trust Co. v. California Development Co.*, *supra*, and the finding to that effect is erroneous.

Inasmuch as the data are not privileged merely because communicated to the city attorney, and have lost their confidential character because already made public, it follows that that portion of the judgment excepting such matter from that which petitioner is entitled to inspect cannot be upheld.

The judgment must be modified to omit from the writ the exception of all confidential reports, estimates, or data collected or compiled by assistants or other engineers for the use of the city attorney or other attorneys representing the city and county of San Francisco in legal proceedings, and, as so modified, the judgment is affirmed.

In view of the foregoing conclusions, it becomes unnecessary to consider the contentions of petitioner relating to his appeal from the order denying his motion to vacate the judgment and amend the conclusions of law.

The judgment is affirmed as above modified.

Shaw, C. J., Lennon, J., Wilbur, J., Sloane, J., Shurtleff, J., and Waste, J., concurred.

[S. F. No. 9463. In Bank.—December 12, 1921.]

**KATHERINE DOWD (a Widow), Appellant, v. ATLAS TAXICAB AND AUTO SERVICE COMPANY, etc., Respondents.**

[S. F. No. 9465. In Bank.—December 12, 1921.]

**SIBYL E. DOWD, Appellant, v. ATLAS TAXICAB AND AUTO SERVICE COMPANY, etc., Respondents.**

[1-2] **NEGLIGENCE—INJURY TO TAXICAB PASSENGER—EXCESSIVE SPEED — DUTY OF PASSENGER — ERRONEOUS INSTRUCTIONS.**—In an action for injuries received by a taxicab passenger through the overturning of a machine alleged to have been caused by its operation at an excessive rate of speed, an instruction charging in substance that if plaintiff knew that the automobile was being driven at an unlawful rate of speed, but nevertheless continued voluntarily to ride therein, having the opportunity to leave it, but not doing so, she would not be entitled to recover, and an instruction charging in substance that if plaintiff knew that the automobile was being driven at an unlawful rate of speed in time to have objected and left the machine or to have had the speed decreased prior to the accident, but made no objection and effort to be permitted to leave it, the verdict must be for defendants, constitute erroneous statements of the law.

[3] **ID.—PRESUMPTION OF NEGLIGENCE—REBUTTAL BY PREPONDERANCE OF EVIDENCE—MODIFICATION OF INSTRUCTION.**—In such action, an instruction that the "presumption" is that the overturning of the taxicab occurred through the negligence of the driver, and in order to rebut the presumption the defendants must show "by a preponderance of evidence" that the overturning was a result of an inevitable casualty or of some cause which human care and foresight could not prevent, was properly modified by changing the word "presumption" to the word "inference" and by striking out the words "by a preponderance of the evidence."

**APPEALS** from judgments of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Reversed.

The facts are stated in the opinion of the court.

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1. Proprietor of taxicab as common carrier, notes, *Ann. Cas.* 1916D, 767; 4 *A. L. R.* 1501; 5 *L. R. A. (N. S.)* 1069.

Ed. F. Jared, S. C. Wright and Mervyn R. Dowd for Appellants.

Ford & Johnson, Geo. K. Ford and Elliott Johnson for Respondents.

RICHARDS, J., *pro tem.*—These two actions arose out of injuries received by the plaintiff in each through the overturning of a taxicab of the defendants while the plaintiffs were passengers therein. The accident occurred in the city of San Francisco at an early hour in the morning of January 1, 1919. The defendants were at the time co-partners, owning and operating through their employees certain taxicabs for hire within said city. The plaintiffs, with other members of their family and friends, the party numbering seven in all, entered one of these taxicabs driven by an employee of said defendants, and hired by one of the members of said party, other than said plaintiffs, for the purpose of conveying them from a point on O'Farrell Street, near Powell, to their respective homes. The taxicab in question was an inclosed limousine, the seat of the driver being on the outside of its glass inclosure. After being driven for a considerable distance along and across the streets of said city, the taxicab skidded upon a wet and slippery portion of Market Street at or near the point of its intersection with Grove Street and was overturned, and each of the plaintiffs was severely injured. They commenced these separate actions to recover damages by reason of their said injuries and each alleged in her complaint that said accident with resultant injuries occurred through the negligence of the employee of the defendant operating said taxicab, which consisted in his having carelessly driven and operated the same at an unlawful and excessive rate of speed, by reason of which, without fault on the part of the plaintiffs, the taxicab turned over and the plaintiffs were thereby seriously injured. The defendants, in their answer in each case, denied the alleged or any acts of negligence on the part of their said employee, and by way of affirmative defense alleged that the said accident and plaintiffs' consequent injuries were the result of contributory negligence of each of the plaintiffs in said actions. The causes were, by agreement of the parties, tried together

before the court sitting with a jury, which in each case returned a verdict in favor of the defendants. Motions for new trial were made and denied in each case and appeals taken from the judgments respectively rendered and entered therein, said appeals having, by agreement, been presented together upon identical records and briefs.

[1, 2] The first and main contention of the appellant in each of said cases is that the trial court committed prejudicial error in giving to the jury the following two instructions:

“If you find in this case that the automobile in which plaintiff was riding was driven at a rate of speed prohibited by law, and that plaintiff knew of the fact, but nevertheless voluntarily continued to ride in the automobile (and that she had opportunity to leave the machine and did not do so), and if you further find that the accident was proximately caused or contributed to by reason of the speed that the automobile was driven, then I instruct you that the plaintiff is not entitled to recover any damages and your verdict must be in favor of defendant.

“If you find the automobile in which plaintiff was riding prior to the happening of the accident was being driven at an unlawful rate of speed, and if you further find that plaintiff knew that fact in time to have objected and to have left the automobile, or to have the speed decreased to a lawful rate prior to the happening of the accident, and you further find that plaintiff made no objection and made no effort to be permitted to leave the automobile, and if you further find that the accident was proximately caused or contributed to by such unlawful rate of speed, then I instruct you that plaintiff is not entitled to recover in this action and your verdict must be in favor of the defendant.”

It must be conceded that the foregoing instructions, if erroneous, constituted prejudicial error for which a reversal of each of these judgments would be ordered. They are each predicated upon the premise that the defendants' employee was driving said taxicab at an unlawful rate of speed during much of the way from the point where the plaintiffs became his passengers to the place where the accident occurred and at the very time of its occurrence. The practically undisputed evidence in each of these cases shows this to have been the fact. The plaintiffs, therefore,

would have been entitled to recover damages for their injuries suffered in said accident unless they were each found by the jury to have been guilty of contributory negligence. The trial court charged the jury in the first of these instructions in substance that if the plaintiff in each case knew the fact that the automobile in which said plaintiff was riding was being driven at a rate of speed prohibited by law, but nevertheless continued voluntarily to ride therein, having the opportunity to leave the machine, but not doing so, she would not be entitled to recover damages and their verdict must be for the defendants. In the second of said instructions the court charged the jury in substance that if the plaintiff knew, prior to the happening of the accident, that the automobile in which she was riding was being driven at an unlawful rate of speed and knew that fact in time to have objected and to have left the automobile or to have the speed thereof decreased to a lawful rate prior to the happening of the accident, but made no objection and made no effort to be permitted to leave the automobile, she would not be entitled to recover damages and their verdict must be for the defendants. Each of said instructions, in our opinion, constitutes an erroneous statement of the law. These plaintiffs were each passengers for hire in the taxicab owned by the defendants and driven under their directions by their employee, who was in control of the operation, route, and speed of said vehicle, subject only to the general direction of the plaintiffs as to their respective destinations. It was the primary duty of the defendants herein to furnish a competent driver of the taxicabs they were furnishing to passengers for hire, and it was the primary duty of such driver to exercise, with respect to the safety of said passengers, the highest degree of care. There is no evidence herein other than that deducible from the fact immediately preceding and attending this accident that the driver was incompetent or that he was not at all times up to the moment of such accident in full control of the machine, nor are the instructions criticised herein predicated upon any such assumption.

In the case of *Little v. Hackett*, 116 U. S. 366, [29 L. Ed. 652, 6 Sup. Ct. Rep. 391, see, also, Rose's U. S. Notes], Mr. Justice Field, after an exhaustive review of the cases upon the subject up to the time of his decision, states what



would seem to be the reasonable rule respecting the duty and responsibility of passengers for hire in public conveyances.

“There is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. ‘If the law were otherwise,’ as said by Mr. Justice Depue in his elaborate opinion in the latest case in New Jersey, ‘not only the hirer of the coach but also all the passengers in it would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried.’ (*New York, L. E. & W. R. R. v. Steinbrenner*, 47 N. J. L. (18 Vroom) 161, 171.)”

In the case of *Southern Pac. Co. v. Wright*, 248 Fed. 261, [160 C. C. A. 339], the court lays down what would seem to be the general rule governing the duties of passengers for hire in circumstances of the character of those involved in the

instant case as follows: "Generally it is the duty of the passenger to sit still and say nothing. It is his duty, because any other course is fraught with danger. Interference, by laying hold of an operating lever, or by exclamation, or even by direction or inquiry, is generally to be deprecated; in the long run, the greater safety lies in letting the driver alone."

In the case of *Bernhardt v. City & S. Ry. Co.*, 263 Fed. 1009, 49 App. D. C. 265, the general rule is thus stated in a case in many of its aspects identical with the case at bar: "It seems to us that where, for instance, a person hires a taxicab to convey him from his residence to a depot or some other point, he is not required, save under exceptional circumstances, to be on the lookout for danger at the risk of being charged with contributory negligence in case of accident, if he fails to do so. The primary duty of caring for the safety of the vehicle and passenger rests upon the driver, and unless the danger is known to the passenger he may rely upon the assumption that the driver will exercise proper care and caution. But if the passenger knows that the driver is incompetent or careless, or that he is not aware of a danger known to the passenger, and is not taking proper precautions, it is his duty to notify the driver of the peril, and it may devolve upon him to insist that the driver shall stop the vehicle and allow him to alight, or take some other suitable action for his own protection. If the passenger fails in any of these respects, he may be chargeable with contributory negligence. (*Anthony v. Kiefner*, 96 Kan. 194, [200 Ann. Cas. 1916E, 264, L. R. A. 1915F, 876, 150 Pac. 524].)"

In the case of *Thompson v. Los Angeles etc. Ry. Co.*, 165 Cal. 748, [134 Pac. 709], the general principle set forth in the foregoing cases is recognized and restated as follows: "That the chauffeur operating the automobile was guilty of negligence in running upon the track along which the motor-car was approaching in plain view is too clear for discussion, and is, indeed, conceded by the respondent. But the fact that he was negligent does not, of course, conclude the plaintiff on the issue of her contributory negligence. She was a passenger for hire. The chauffeur was not employed by her, and she did not undertake to direct the manner in which the automobile should be operated. The negligence of the chauff-

feur is not to be imputed to her. (*Little v. Hackett*, 116 U. S. 366, [29 L. Ed. 652, 6 Sup. Ct. Rep. 391]; *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, [5 L. R. A. (N. S.) 1059, 85 Pac. 152]; *Fujise v. Los Angeles Ry. Co.*, 12 Cal. App. 207, 218, [107 Pac. 317].) It is, of course, true, that a passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety. If such passenger is aware that the operator is carelessly rushing into danger, it may be incumbent upon him to take proper steps for his own safety. But here there was evidence that Mrs. Thompson was a stranger in San Diego, that she did not know that the road crossed a railway track, and that she was not aware of the approaching car. Under these circumstances it certainly cannot be said, as a matter of law, that she was negligent in failing to call the attention of the chauffeur to the danger of the situation. Nor was the evidence such as to compel the conclusion that the chauffeur was manifestly incompetent and inattentive to his duties to such a degree as to impose upon the plaintiff any greater obligation of watchfulness than that which would otherwise have been hers."

In the case at bar there is the added element that the undisputed evidence shows, and the court in its said instructions assumes, that the plaintiffs knew that the automobile in which they were riding was being driven at a rate of speed prohibited by law, and the question which arises is whether mere knowledge of this fact is to be held to cast upon the plaintiffs the duty of objecting to the conduct of the driver in so operating the machine to the extent of either refusing to continue to ride in the automobile or of having the speed decreased to a lawful rate prior to the happening of the accident. The trial court so charged the jury in these instructions, and in so doing omitted, we think, an essential element noted and referred to in the foregoing cases and particularly emphasized in the case of *Thompson v. Los Angeles etc. Ry. Co.*, *supra*. That element consisted in the right of the plaintiffs to have their and each of their duty in the premises measured by the rule of ordinary care. Knowing that the vehicle was being driven at an unlawful rate of speed, they were only bound to take such proper precautions for their own safety as a reasonable person under similar conditions would take. They were not bound

to leave the machine unless such act would be the act of a reasonable person. It might well be that for a passenger to attempt to leave a taxicab being driven at an unlawful rate of speed would be a most unreasonable and reckless act. Neither were they bound to attract or distract the attention of the driver simply because he was proceeding at an unlawful rate of speed, unless the taking of steps to that end would, under the circumstances, have been the act of a reasonable person; since it might well be that so to do would involve greater danger than would arise from proceeding at said rate of speed. The instructions of the court made no allowance for these alternatives, but bound the plaintiffs upon their mere knowledge that the driver was proceeding at an unlawful rate of speed to either leave the machine or compel a reduction of the speed, regardless of whether either of these things could be done or attempted with reasonable safety, and under penalty of losing their right to recovery in the event of an accident caused by such excessive speed. The result of the adoption of the rule embodied in these instructions would be that of imposing upon every passenger in a public conveyance, whether a railroad train, a street-car, or a motor vehicle, the duty whenever they deemed it was proceeding at an unlawful or excessive rate of speed of leaving the conveyance, or of pulling the bell cord signaling the motorman, attracting the attention of the driver, or taking such other steps as were available to either leave the vehicle or to compel the engineer, the motorman or driver to bring the vehicle to a standstill or, at least, work a reduction in its speed. No such duty is, in our opinion, imposed upon passengers for hire in a public conveyance, and it follows that these instructions of the trial court, in so far as they attempted to impose such duty, were erroneous.

These instructions were also erroneous for another reason made plain by the evidence in the case, which shows that these plaintiffs, becoming nervous over the rate of speed and zigzagging motion with which the machine was proceeding, began making efforts by hammering on the window with their hands and calling aloud in an effort to attract the attention of the driver and cause him to lessen the speed of the machine. It was for the jury to determine the sufficiency of these efforts to absolve the plaintiffs of re-

sponsibility under proper instructions of the court. These instructions leave no room for such interpretation, since in effect they charge the jury that the plaintiffs, knowing that the speed of the car was excessive, must either have left the car or succeeded in compelling a reduction in its speed. They did not do the former, and their effort to do the latter, however reasonable, being unsuccessful, would, under these instructions, avail them nothing. Under the foregoing authorities this cannot be the law.

[3] The appellants further contend that the trial court erred in modifying a requested instruction and in giving said instruction to the jury in its modified form. The instruction as asked by the appellants read as follows:

"I charge you that upon a trial of this character it is only necessary for the plaintiffs, in order to establish a *prima facie* case, to prove the overturning of the taxicab and the injuries caused thereby. Having done this, they may rest, for the presumption is that the overturning occurred through the negligence of the driver, and the burden of proving that there has been no negligence is then cast upon the defendants. In order to rebut this presumption of negligence the defendants must show by preponderance of evidence that the overturning was a result of an inevitable casualty, or of some cause which human care and foresight could not prevent. The law holds the defendants responsible for the slightest negligence. It is incumbent upon the defendants to explain how the overturning of the automobile occurred, and if they fail to do this, the presumption of negligence remains."

The court modified this instruction by changing the word "presumption" where it appears therein to the word "inference," and by striking out the words "by a preponderance of evidence." The instructions as thus modified and then given by the court read as follows:

"I charge you that upon a trial of this character it is only necessary for the plaintiffs, in order to establish a *prima facie* case, to prove the overturning of the taxicab and the injuries caused thereby. Having done this, they may rest, for the inference then arises that the overturning occurred through the negligence of the driver, and the burden of proving that there has been no negligence is then cast upon the defendants. In order to rebut this pre-

sumption of negligence the defendants must show that the overturning was a result of an inevitable casualty, or of some cause which human care or foresight could not prevent. The law holds the defendants responsible for the slightest negligence. It is incumbent upon the defendants to explain how the overturning of the automobile occurred, and if they fail to do this, the inference of negligence remains."

The trial court committed no error in making the modification above noted in the plaintiffs' requested instruction and in giving such instruction in its modified form. The instruction as requested by the plaintiffs differs from the instruction approved by this court in the case of *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, [125 Am. St. Rep. 68, 93 Pac. 106], upon which the plaintiffs rely, by the insertion therein of the words "by a preponderance of evidence," which words the trial court properly struck from said instruction. (*Valente v. Sierra Ry. Co.*, 151 Cal. 534, [91 Pac. 481]; *Learned v. Peninsular Rapid Trans. Co.* (Cal. App.), 193 Pac. 591.) The trial court also properly modified the plaintiffs' requested instruction by the substitution of the word "inference" for "presumption" therein. (*O'Connor v. Mennie*, 169 Cal. 217, [146 Pac. 674]; *Onell v. Chappell*, 38 Cal. App. 376, [176 Pac. 370]; *Thomas v. Visalia Electric R. R. Co.*, 169 Cal. 658, [147 Pac. 972]; *Davis v. Hearst*, 160 Cal. 143, [116 Pac. 530].) We think the instruction as modified by the trial court and given in such modified form to the jury embraced a correct statement of the law.

The judgment in each case is reversed.

Shaw, C. J., Lennon, J., Sloane, J., Shurtleff, J., and Waste, J., concurred.

WILBUR, J., Concurring.—I concur.

In view of a new trial, however, I think that it should be stated that the defendant cannot predicate a charge of contributory negligence upon a failure of the plaintiffs to object to the driving of the car at an excessive speed which caused the accident. In such case the proximate cause of the accident is the negligence of the driver in driving at an excessive speed, and not the failure of the passenger to

remonstrate with him for his negligence in so driving. Nor is the failure of a passenger to leave the car because of such excessive speed an act of contributory negligence. The passenger had a right to rely upon the duty of the driver to exercise the highest degree of care for his protection. This obligation was contractual and continuing, and the passenger was not obliged to rescind the contract of carriage because of the misconduct of the carrier, but could rely upon the continuing obligation of the carrier to exercise due care for his protection, and such reliance is not an act of negligence.

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[S. F. No. 9842. In Bank.—December 12, 1921.]

**TULARE WATER COMPANY (a Corporation), Appellant,  
v. STATE WATER COMMISSION et al., Respondents.**

[S. F. No. 9845. In Bank.—December 12, 1921.]

**TULARE WATER COMPANY (a Corporation), Appellant,  
v. STATE WATER COMMISSION et al., Respondents.**

- [1] **WATERS AND WATER RIGHTS—STATE WATER COMMISSION—APPLICATION FOR APPROPRIATION—ARBITRARY DENIAL.**—The State Water Commission created by the act of the legislature (Stats. 1913, p. 1012) does not possess and could not be invested with power to arbitrarily deny an application made in conformity to the act for the appropriation of water that is subject to appropriation.
- [2] **ID.—PERMITS FOR APPROPRIATION OF WATERS—POWERS OF COMMISSION.**—The State Water Commission under the act of 1913 has only supervisory discretion in the matter of granting permits for the appropriation of unappropriated waters of the state.
- [3] **ID.—EXERCISE OF DISCRETIONARY POWERS—MANDAMUS.**—*Mandamus* is a proper remedy to compel a reasonable exercise of such discretionary powers as are granted by the act creating the State Water Commission.
- [4] **ID.—COMMISSION WITHOUT JUDICIAL POWERS — CONSTITUTIONAL LAW.**—In view of section 1 of article VI of the constitution vesting in the courts therein mentioned the entire judicial power of the state, it is not within the power of the legislature to give to the State Water Commission the judicial power to establish and declare the right and title to private property. (Concurring opinion of Shaw, C. J.)



APPEALS from judgments of the Superior Court of the City and County of San Francisco. George E. Crothers, Judge. Reversed and affirmed.

The facts are stated in the opinion of the court.

Edward F. Treadwell, Berkeley B. Blake and Forrest A. Cobb for Appellant.

L. D. Bohnett for Respondents.

SLOANE, J.—The petitioner, Tulare Water Company, appellant in these actions, applied to the State Water Commission for a permit to appropriate water of the Kern River for the purpose of irrigating agricultural lands.

The application was in due form and in conformity with the provisions of the act of 1913 creating a Water Commission and providing for the presenting and granting of petition to make such appropriations (Stats. 1913, p. 1012).

The application was denied without a hearing by the commissioners, and the petitioner thereupon instituted a proceeding in *mandamus* before the superior court of the city and county of San Francisco to compel the granting of such permit.

A demurrer was sustained to the petition for writ of mandate, without leave to amend, and judgment was made and entered for the defendants. Petitioner thereupon took an appeal from this judgment to the district court of appeal of the first appellate district.

Being uncertain as to its remedy, petitioner also instituted a proceeding in the superior court for a writ of *certiorari*, to review and annul the action of the Water Commission in denying without a hearing its application for leave to make its water appropriation.

This petition was likewise denied upon the sustaining of demurrer thereto, and an appeal was taken to the court of appeal from this judgment also.

Both appeals come to this court upon an order granting a hearing after judgment in the district court of appeal in favor of petitioner in the *mandamus* case and in favor of respondent on the writ of review.

As both appeals involve a general construction of the powers and duties of the Water Commission under the act of 1913, we will consider them together.

The first contention of the petitioner is that upon the presentation of an application in due form and in compliance with the rules of the Water Commission it became the duty of the commission as a ministerial act to issue a permit for the appropriation asked for, and that the issuance of such permission may be enforced by *mandamus*; and, secondly, that if the commission has any judicial function in the matter there was a refusal to exercise it in passing upon the application presented, and its action in the matter is subject to review by *certiorari* as being in excess of its jurisdiction.

Section 17 of the Water Commission Act provides that "Any person, firm, association or corporation may apply for and secure from the state water commission, in conformity with this act and in conformity with reasonable rules and regulations adopted from time to time by the state water commission, a permit for any unappropriated water or for water which having been appropriated or used flows back into a stream or lake or other body of water within this state. . . . "

Section 15 provides that "The state water commission shall allow, under the provisions of this act, the appropriation of unappropriated water or of the use thereof, or of water or the use thereof which may hereafter cease to be appropriated, or which may hereafter be declared to be unappropriated, or which having been used under claim of riparian proprietorship or appropriation finds its way back into a stream, lake or other body of water and also such water as is declared by section 11 of this act to be subject to appropriation."

Section 11 defines with greater particularity what waters are subject to appropriation, including riparian waters that have not been applied to riparian lands within a specified time.

Petitioner claims a full compliance with all the requirements of the act and of the rules and regulations of the commission in preparing and presenting its application, and no point is made by respondents of any omission in this respect.

It must be assumed, then, on the pleadings, that the petitioner complied with, and has in the pending matter pleaded, all the conditions required to entitle it to a permit to ap-

appropriate such quantity of the waters of the Kern River as it could put to beneficial use for the purposes alleged, and which was at the time unappropriated.

If any discretion was vested in the commission, or any matter submitted for judicial consideration, it was to determine whether there was any unappropriated water in the Kern River at that time subject to this proposed appropriation.

[1] The commission surely does not possess and could not be invested with power to arbitrarily deny an application made in conformity to the law for the appropriation of water that was subject to appropriation.

The purpose of the act is clearly to permit any person or corporation desiring to make any of the enumerated beneficial uses of waters of the state, not otherwise utilized, to avail itself of this right of appropriation.

Under the law in force prior to the adoption of this act (Civ. Code, secs. 1410-1422) no permission was required for the appropriation of waters of the state. All that was required to create a preferential right to such water was to actually appropriate it to some authorized beneficial use, or to make a water filing to be followed with due diligence by an actual user.

The obvious aim of the Water Commission Act was not to abolish, but to regulate and administer, this privilege.

The positive right to such permit is granted by section 17 of the act to any person who makes application as provided by the act and the rules of the commission. The mode and manner of making the application is prescribed. But what is the jurisdiction granted to the commission in determining the status of the water supply or the priority of rights thereto and in ascertaining if the water claimed is subject to appropriation?

The commission is authorized by section 10 "to investigate for the purpose of this act all streams, stream systems, portions of stream systems, lakes or other bodies of water, and to take testimony in regard to the rights of water or the use of water thereon or therein, and ascertain whether or not such water, or any portion thereof, or the use of said water or any portion thereof, heretofore filed upon or attempted to be appropriated by any person, firm, association or corporation, is appropriated under the laws of this state."

While it appears from the provisions above quoted that the act is intended to authorize an investigation, and the exercise of some degree of discretion by the Water Commission as to the sufficiency of the application, and as to the existence of water subject to appropriation, no formal hearing is prescribed, and no authority granted to judicially determine the fact as to unappropriated water, or to adjudicate conflicting claims that might exist thereto. Even if a hearing could be required, the commission is without jurisdiction to finally determine the existence or nonexistence of water subject to appropriation, and in such a case its denial of an application, if held to be a judicial determination of the right, would leave the petitioner without remedy, as no appeal is provided for, and *certiorari* would only go to the regularity of the proceeding and not to the merits of the ruling.

[2] In view of the several other powers and duties devolving upon the Water Commission under this act in the supervision of the distribution of water subject to appropriation, and in determining the rights and obligations of interested parties, in which hearings of a judicial nature are provided for with much particularity, and provision is made for review of action of the Water Commission by the courts, it is fair to conclude that it was not intended to grant to the commission in the matter of this preliminary permit to file upon unappropriated water more than a supervisory discretion in the matter of granting such permits. At any rate, it is manifestly impracticable for the Water Commission to authoritatively determine that there is not water in a given stream subject to appropriation. What is unappropriated water is a constantly fluctuating question, depending upon the seasonal flow of the stream, the annual rainfall, the forfeiture of prior appropriations and default in the use of riparian rights. To conclude the rights of would-be appropriators by the extrajudicial and perhaps arbitrary action of a board of water commissioners would be to deprive such applicant of a valuable property right without due process of law.

[3] Under such conditions *mandamus* is a proper remedy to compel a reasonable exercise of such discretionary powers as are granted by the act. It is well settled that *mandamus* will issue to correct an abuse of discretion, if the case is

otherwise proper. (*Wood v. Strother*, 76 Cal. 545, [9 Am. St. Rep. 249, 18 Pac. 766]; *Ex parte Bradley*, 7 Wall. 377, [19 L. Ed. 214, see, also, Rose's U. S. Notes]; *State v. Lafayette Co.*, 41 Mo. 226; *Village of Glencoe v. People*, 78 Ill. 382; *People v. Superior Court*, 10 Wend. 285; *Hammel v. Neylan*, 31 Cal. App. 22, [159 Pac. 618].)

As in all cases of ministerial duty the obligation to perform depends upon the determination of the existence of certain prerequisite facts, but where such facts exist, the duty is mandatory.

Mere authority to decide as to the existence of a given fact does not necessarily take the official or board so deciding beyond the reach of a writ of mandate, especially where there is no remedy by appeal.

This doctrine is well stated in a note to *Weeden v. Town Council*, 98 Am. Dec. 375, citing in its support *Rex v. Justices*, 1 W. Black. 606; *Commonwealth v. Justice*, 2 Va. Cas. 9, and is as follows: "For instance, the law may confer a right upon a person or tribunal, judicial or otherwise, which, on being shown that these acts were done, is directed to concede the right, or to issue some evidence of it. In such cases it is manifest that some intelligence and judgment must be employed in determining whether the designated facts exist. But the examining person or tribunal may capriciously determine that the acts have not been performed, and withhold the right, or the evidence of it. If there is no remedy by resort to some appellate proceeding, the courts must either investigate the questions involved, and by *mandamus* compel appropriate action, or suffer the injured party to be capriciously denied a right to which he shows himself unquestionably entitled, and we think that all fair minded courts will compel the requisite action by *mandamus*."

The same rule is recognized in *Wood v. Strother*, *supra*. The action was a proceeding in *mandamus* to compel the auditor of San Francisco to countersign a street assessment warrant under an act which required that before signing he "shall examine the contract, the steps taken previous thereto, and the record of assessments, and must be satisfied that the proceedings have been legal and fair." The argument against the writ was that the statute requires the auditor to examine the proceedings, and satisfy himself that they are legal before signing; and that if he has examined them

and become satisfied that they are not legal, the most that can be said is that he has committed an error in a matter confided to his discretion, and that the function of the writ is not to review such exercise of discretion. The opinion, however, after reviewing many authorities on the subject, says: "In view of the foregoing cases, it seems a mere perversion of language to say that a writ will never issue to control judicial action, or compel a tribunal to act in a particular way. It is by no means intended to assert that the writ could issue in this state in all the cases above referred to. The propriety of the issuance of the writ in any case must depend upon whether, under the law of the state where the litigation arises, the determination was intended to be final; and if not, upon whether the system of practice furnishes any other adequate remedy. These things might be different in different states; but the cases cited serve to show that the formulas above mentioned are not universally and literally true, and that it is dangerous to reason from them as if they were so.

"In every case the tribunal that is to act must determine in the first instance whether the case is a proper one for its action. And in our opinion the true tests are whether its determination is intended by law to be final; and if not, whether there is any other 'plain, speedy, and adequate remedy.' If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on *mandamus* or in any other way. If it was not intended to be final, but there is another 'plain, speedy, and adequate remedy,' the writ cannot issue; for it was not designed to usurp the place of other remedies. But if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue. Otherwise there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice. And this is its ancient office. In the language of Lord Mansfield: 'It was introduced to prevent disorder from a failure of justice and defect of police. Therefore, it ought to be used upon all occasions where the law has established no specified remedy, and where, in justice and good government, there ought to be one.' "

*Stockton R. R. Co. v. Stockton*, 51 Cal. 328, 338, was a proceeding by *mandamus* to compel the delivery to petitioner

of certain bonds. It was urged by respondent that under the statute governing the matter the bonds could not be issued until the common council certified to certain facts. This the council refused to do on account of alleged failures to comply with the conditions. Niles, J., writing the opinion in the case, says:

“On this theory the common council might forever defeat the delivery of bonds, by declining to be satisfied, even though it appeared by the most convincing proof that the road in every minute particular had been constructed and stocked in the manner and within the time prescribed by the statute. We had a similar question before us in the case of the *People v. Supervisors of Alameda*, 45 Cal. 395. In that case a petition, signed by the requisite number of qualified electors, had been presented to the board of supervisors, requesting that an election be called on the question of removing the county seat. The board refused to order an election, and an alternative writ of *mandamus* was issued out of this court. The proceedings for the removal of the county seat were had under section 3976 et seq. of the Political Code; and in its answer to the suit the board set up as one of its defenses that, under the statute, it was its duty to determine whether the petition was signed by the requisite number of qualified electors, and it was not satisfied from the proofs offered in support of the petition that it was so signed; and for that, among other reasons, had declined to order an election. We struck out this portion of the answer, as constituting no defense, and ordered an issue to be tried. whether, in point of fact, the petition was signed by the requisite number of qualified electors. Our view of the law then was, and yet is, that if an official duty is to be performed on the happening of an event, the officer cannot arbitrarily or capriciously refuse to perform it, after the event has happened, on the plea that he is not satisfied that it has happened. If the fact exists, and is established by sufficient proofs, it is his legal duty to be satisfied, and to act accordingly.”

In *Iglin v. Hoppin*, 156 Cal. 484, [105 Pac. 582], a case quite similar in its facts to the one before us, it was there sought by *mandamus* to compel the supervisors of Yolo County to subscribe a specific order theretofore given by them denying the application of petitioner to have certain



lands in a reclamation district set off into an independent district, and to enter an order granting the petition. A general demurrer was sustained on the ground that exclusive jurisdiction to determine the facts upon which the order was made was vested by the legislature in the supervisors, and that their action could not be reviewed by *mandamus* proceedings. The opinion holds that upon the facts pleaded and taken as admitted on the demurrer the petitioners were entitled to relief by *mandamus*.

In *Puterbaugh v. Wadham*, 162 Cal. 611, [123 Pac. 804] this court has said: "It is undoubtedly true that the writ of *mandamus* is not a writ of error and that, generally speaking, it is not available for the purpose of altering or varying in any particular the finding of a judicial or quasi-judicial body or officer acting within its or his appropriate jurisdiction; but where the facts are not disputed and the only matter to be determined is the duty of the body or officer under the law, the court will define such duty and enforce not only its performance, but the carrying out of the obligations of the respondent body or officer in a particular manner."

To the same effect is the decision in *Harleson v. San Joaquin Irr. Dist.*, 20 Cal. App. 324, [128 Pac. 1010].

These citations are at least sufficient authority for holding in the matter before us that the trial court was in error in sustaining the demurrer to the petition for writ of mandate. All the allegations of the petition must be taken as true on demurrer, and such petition alleged all the facts required to entitle the petitioners to the relief demanded.

The judgment is reversed as to the proceeding for writ of mandate, with direction to the trial court to overrule the demurrer and hear the cause on the merits.

As to the petition for writ of review, there being no judicial powers vested in the Water Commission, so far as applies to the matter before us, the judgment thereon is affirmed.

Wilbur, J., Lennon, J., and Shurtleff, J., concurred.

SHAW, C. J., Concurring.—I concur in the opinion of Mr. Justice Sloane, so far as it deals with the question of the appeal from the judgment of the court below denying a writ of mandate, being the appeal S. F. No. 9842.

I think, however, that something more may properly be said on the question whether or not the Water Commission, in exercising the power conferred upon it by the sections of the statute particularly considered in the opinion, may, under some circumstances, act in a judicial capacity. It is obvious that if it does so it will be taking property of one person and giving it to another; in other words, that it will be exercising powers which cannot be exercised except by courts authorized by the constitution.

Section 1 of article VI of the constitution declares that "The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district courts of appeal, superior courts and such inferior courts as the legislature may establish in any incorporated city or town, township, county, or city and county."

If the Water Commission is acting judicially it is doing so because it is determining the rights and titles of individuals to private real property, and in that capacity it would be acting as a court as fully as a court of general jurisdiction would be acting when it adjudicates the title to real property. (*Quinchard v. Board of Trustees*, 113 Cal. 669, [45 Pac. 856]; *People v. Board*, 122 Cal. 424, [55 Pac. 131]; *Rhode Island v. Massachusetts*, 37 U. S. (11 Pet.) 718, [9 L. Ed. 697, see, also, Rose's U. S. Notes]; *Prentis v. Atlantic etc. Co.*, 211 U. S. 226, [53 L. Ed. 150, 29 Sup. Ct. Rep. 67]; *Marin etc. Co. v. Railroad Com.*, 171 Cal. 712, [Ann. Cas. 1917C, 114, 154 Pac. 864].)

[4] The effect of section 1, article VI, aforesaid, is to vest in the courts therein mentioned the entire judicial power of the state. It is not within the power of the legislature to vest in any other body any general judicial power to establish and declare the right and title to private property. The Water Commission is not one of the superior courts of the state and could not be made such court or be given the powers thereof, and it is not an inferior court with jurisdiction limited to incorporated cities, or towns, townships, counties, or cities and counties. On the contrary, its jurisdiction is statewide. Consequently, it is not a court which comes within the purview of said section 1 and it is not within the power of the legislature to give that commission such judicial power. (*Western etc. Co. v. Pillsbury*, 172 Cal. 413, [Ann. Cas. 1917E, 390, 156 Pac. 491]; *Pacific etc.*

*Co. v. Pillsbury*, 171 Cal. 322, [153 Pac. 24].) There is no other section of the constitution which purports to confer power upon the legislature to invest such commissions with judicial power of this nature. Certain judicial powers may be invested in the Industrial Accident Commission and in the Railroad Commission, but with these exceptions all the general judicial power of the state must be vested in the courts named in the constitution and in such inferior courts of local jurisdiction as may be established under said section 1.

For this reason I am of the opinion that the act confers no judicial power upon the Water Commission, and if it purported to do and so far as it may purport to do so it would be and is without effect. The consequence is that any award it assumed to make in the exercise of such purported judicial power would be absolutely void and that *certiorari* would not lie to review its action in that regard.

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[Sac. No. 3014. In Bank.—December 13, 1921.]

ROBERT B. REYNOLDS, Appellant, v. CHURCHILL  
COMPANY (a Corporation), Respondent.

- [1] PUBLIC LANDS—ISSUANCE OF PATENT—MANDAMUS—RES ADJUDICATA.—In a proceeding in *mandamus* originally brought in the supreme court to compel the state surveyor-general to issue a patent to land owned by the state based upon a certificate of purchase alleged to have been validated by an act of the legislature, the judgment dismissing the proceeding is conclusive on the state and of the rights of the petitioner under such certificate both as to the claims set forth therein and as to any others which might have been presented.
- [2] ID.—CONTEST—EVIDENCE—JUDGMENT IN MANDAMUS PROCEEDING—CONSTRUCTION.—Where, during the pendency of a contest between private claimants for the right to purchase state lands, one of them brought a *mandamus* proceeding in the supreme court to compel the state surveyor-general to issue a patent to the petitioner, notwithstanding the pendency of the contest, the judgment dismissing the proceeding is binding upon the petitioner and admissible in the trial of the contest, notwithstanding the recital therein "that the rights of the contestants are not foreclosed by our decision herein" (178 Cal. 554), since from the nature and

character of the decision, as well as the context, the term "contestant" was intended to refer to the rights of those who were contesting the claims of the petitioner, and the court did not intend to change the usual effect of the whole opinion and judgment by such clause.

- [3] **ID.—UNSEGREGATED SWAMP AND OVERFLOWED LAND—SALE.**—Under section 3493m of the Political Code, swamp and overflowed land is subject to sale, even if unsegregated.
- [4] **ID.—SHORE OF LITTLE KLAMATH LAKE.—CHARACTER OF LAND.**—In this contest between private parties for the right to purchase, as swamp and overflowed land, certain land forming a part of the bed of Little Klamath Lake, the conclusion of the district court of appeal that the government surveys of 1873 established the character of the land as sovereign and not as swamp and overflowed land is held to be erroneous, and that it cannot be declared as a matter of law, from facts of which the court takes judicial notice, that the land is not swamp and overflowed land.
- [5] **ID.—CONTEST—STATE NOT A PARTY—JUDGMENT—LACK OF ESTOPPEL.**—While it is made the duty of the state surveyor-general under section 3416 of the Political Code to issue his patent or certificate to the successful party in a contest for the right to purchase state lands, the state is not a party to the contest and is not estopped by the judgment therein.
- [6] **ID.—STIPULATION AS TO CHARACTER OF LANDS—FORECLOSURE OF INQUIRY—EVIDENCE.**—Where, in a contest for the right to purchase state lands, both parties claimed that the lands were swamp and overflowed lands, such question was not an issue, and evidence as to the character of the lands was, therefore, wholly ineffectual and immaterial.
- [7] **ID.—DECISION AS TO CHARACTER OF LAND—RIGHTS OF UNITED STATES.**—A decision of the supreme court in a contest between private persons for the right to purchase land on the shores of Little Klamath Lake that the land is sovereign land is not prejudicial to the rights of the state as against the United States growing out of the act of the legislature (Stats. 1903, p. 4), ceding certain lands in such lake to the United States for reclamation purposes, the government not being a party to the proceeding.

**APPEAL** from a judgment of the Superior Court of Siskiyou County. James F. Lodge, Judge. Reversed.

The facts are stated in the opinion of the court.

A. B. Reynolds, C. E. McLaughlin and Leon Samuels for Appellant.

A. E. Bolton, Arthur W. Bolton and Tapscott & Tapscott for Respondent.

William V. Cowan and Johnson & Lemmon, *Amici Curiae*.

U. S. Webb, Attorney-General, and R. T. McKisick, Deputy Attorney-General, for State of California.

WILBUR, J.—This is a contest instituted by the plaintiff in the office of the surveyor-general of the state and by him referred by proper order to the superior court of the county of Siskiyou, as provided in sections 3414, 3415 of the Political Code. The plaintiff claims a right to purchase land involved by reason of applications made in the office of the surveyor-general in 1917 and contests the prior application and certificate of defendant's assignor. The defendant claims the right to purchase the land under and by virtue of an application filed in the office of the county surveyor of the county of Siskiyou in 1872 and certificate of purchase issued therefor October 4, 1874. The court rendered judgment against the plaintiff, and held valid the certificate of purchase under which defendant claims, and ordered that a patent issue to the defendant upon payment of the fees provided by law. The plaintiff appeals.

During pendency of this contest the defendant petitioned this court for a writ of *mandamus* to compel the issuance of a patent to it, notwithstanding the pendency of this contest. (*Churchill Co. v. Kingsbury*, 178 Cal. 554, [174 Pac. 329].) In that original proceeding the facts were stipulated, as to the character of the land, and the petitioner's application and certificate therefor. The proceeding was dismissed.

Under the trial of this contest the plaintiff offered in evidence the proceedings in the *mandamus* case, and defendant's objection thereto was sustained.

The appellant claims that the respondent is concluded by the judgment of dismissal in the *mandamus* case, and we will consider this point first.

The history of the respondent's claims is fully set forth in the opinion in *Churchill Co. v. Kingsbury*, *supra*. The proceeding was dismissed because the court concluded that under the stipulated facts the land in question was a part of the bed of Little Klamath Lake, which was stipulated to be

a navigable body of water, and hence that the land was owned by the state in its sovereign and not in its proprietary capacity, and that the sale thereof was not authorized by the act of 1893, relied upon by the petitioner as validating its prior certificate of purchase (Stats. 1893, p. 341, subsequently codified [1907] as secs. 3493m to 3493t). The petitioner in the *mandamus* case claimed that the land was sovereign land uncovered by recession, and that the statute of 1893 validated the certificate. The surveyor-general, on the other hand, claimed that the lands were swamp and overflowed lands. The court determined the matter of fact in accordance with the petitioner's contention, but held that the statute of 1893 did not validate the petitioner's certificate of purchase, for the reason that the land in question was not uncovered by the recession of the lake within the meaning of the law of 1893 relied on by petitioner therein.

In this contest both parties alleged in their pleadings that the land was swamp and overflowed land, and so stipulated as well. The defendant also introduced evidence which it claims established the fact that the land was swamp and overflowed land, and the trial court found as a fact that the land was notoriously swamp and overflowed land. On appeal the district court of appeal, third district, held that, notwithstanding the stipulation of the parties, it would take judicial notice of the fact that the land was sovereign land of the state, as shown by the government surveys of record in the office of the United States surveyor-general of this state and the United States general land office. Both parties filed petitions for transfer to this court, and the attorney-general also upon leave filed a similar petition, all contending that the land is swamp and overflowed land. The case has been briefed and argued in this court. The respondent and the attorney-general both claim that the *mandamus* proceeding is not *res adjudicata* in this proceeding and both seek to distinguish the facts in proof herein and as stipulated therein.

[1] We have reached the conclusion that the *mandamus* proceedings are conclusive of the rights of the respondent to purchase the land under its certificate of purchase. In the *mandamus* proceedings the surveyor-general of the state of California represented the state, and the judgment in the case as to the validity of the defendant's certificate of pur-

chase is binding upon the state of California and upon the petitioner in *mandamus*. It was so held in *Bernhard v. Wall*, 184 Cal. 612, [194 Pac. 1040]. In that case an applicant for the purchase of public land had been successful in a *mandamus* proceeding. This court, in discussing the effect of the judgment in *mandamus*, said:

“That judgment was an adjudication that the Parkinson foreclosure was valid, and that the tax deed was invalid. It was conclusive, not only of the matters actually alleged in opposition to the writ, but also of any fact which might have been alleged and proven in that proceeding to show that Bernhard was not entitled to the relief given by the judgment. (*Crew v. Pratt*, 119 Cal. 149, [51 Pac. 38].) It follows, therefore, that if the tax deed on the Foster assessment would have been a defense to the *mandamus* proceeding, it would have been the surveyor-general's duty to plead it therein, and, failing to do so, he would be forever estopped to claim that it was defense. Unquestionably, that judgment was a final adjudication of the right of Bernhard, binding on the surveyor-general in his official capacity. He is the state official in charge of all matters pertaining to the disposal of the public lands of the state. He is *ex-officio* register of the state land office (Pol. Code, sec. 497). His duties in relation to public lands are prescribed in sections 3395 to 3573, inclusive, of the Political Code. In any proceeding against him to compel him to perform an official duty in disposing of the public land, he represents the state, and the judgment rendered in such proceeding is in all respects binding and conclusive against the state to the same extent that it binds the officer in his official conduct with respect to the matter decided. Such a judgment bars the state from afterward setting up to the contrary of what is there adjudicated. . . . It therefore follows that the right of Bernhard to have his application to purchase and his deposit of money accepted on the eleventh day of May, 1903, was conclusively determined by that judgment, not only as against the surveyor-general, but also as against the state. The state and all its officers were thereby estopped to deny such right, or to claim that thereafter in disregard of that right, it had regularly or lawfully disposed of the land to other and subsequent applicants, or that it could so dispose of it, so long as Bernhard's right continued.”



The same rule with reference to the effect of a judgment as against the state in *mandamus* would apply with equal force to the rights of the petitioner. The petitioner would be bound by the judgment not only as to its claims set forth therein, but any others which might have been presented. Let us now consider the issues therein presented and determined and the effect of the judgment. It was there stated:

“The petitioner relies upon the terms of the act of March 24, 1893, providing for the sale of lands uncovered by the recession or drainage of the waters of inland lakes and unsegregated swamp and overflowed lands. (Stats. 1893, p. 341.) . . . Since the act authorizes the sale both of sovereign lands and of unsegregated swamp and overflowed lands, it might not be necessary for the petitioner to maintain that the lands in question fall within one of these classes rather than the other. *It does, however, take the stand that the land is, in fact, sovereign land of the state, and in this, we think, it is clearly right.* . . . The agreed facts in this case show that the land in controversy is a part of the bed of Little Klamath Lake, a navigable body of water. . . . The lake consists of the body of water contained within the banks as they exist at the stage of ordinary high water. . . .

“As we have seen, the lands in question *are not swamp and overflowed*, and the petitioner can, therefore, prevail only by bringing them within the first class described in section 3493, viz.: ‘lands now uncovered or which may hereafter be uncovered by the recession or drainage of the waters of inland lakes, and inuring to the state by virtue of her sovereignty.’ . . . The lands are still covered by the waters of the lake during the greater part of each year. . . .

“It follows that the petitioner has not established his right to any relief.” (Italics ours.) (*Churchill Co. v. Kingsbury, supra.*)

[2] The question of the nature and character of these lands and the right of the petitioner under its application to purchase being directly involved in the proceeding, it is evident that the decision of this court that the lands were not swamp and overflowed lands is binding upon the petitioner as well as the state so far as the petitioner’s right to purchase the land is concerned. The respondent and the at-

torney-general, however, contend that this court expressly left the parties to this contest to have their rights determined in this proceeding. This contention is based upon the concluding sentences of the opinion in *Churchill Co. v. Kingsbury*, *supra*, which reads as follows:

"It appears from the answer that various contests between this petitioner and opposing applicants for purchase of portions of the lands are pending in the superior court, pursuant to reference by the surveyor-general (Pol. Code, sec. 3414). It should perhaps be said that the rights of the contestants are not foreclosed by our decision herein, which is, of course, based upon the facts as stipulated by the parties to this proceeding.

"The alternative writ is discharged and the proceeding dismissed."

The respondent claims that in the proceedings then pending in the county of Siskiyou both parties were "contestants" and, therefore, the opinion must be construed as reserving the rights of both parties. It may be true as an abstract proposition that both parties herein are, in a sense, contestants in the trial of a contest of this character. Both are affirmatively seeking to have their right to purchase the land from the state established by the decree. But the question here is not the significance of the term "contestant" in the abstract, but is, what was intended by this court in the opinion in question when it used the term "contestants." If the court had declined to consider petitioner's claim for the reason that a contest was then pending in which that claim would be presented and determined and had, for that reason, dismissed the proceedings with the statement that its judgment was without prejudice to the rights of the contestants in the then pending contest, respondent's position would be correct beyond peradventure. No such condition, however, is presented by the record. The obvious and avowed purpose of the *mandamus* proceeding was to determine the validity of the petitioner's certificate of purchase, and that because expressly validated by the legislature it was not open to contest.

The court considered the claims of the petitioner in that regard and passed upon them. The decision, therefore, is binding on the petitioner unless the statement of the court with reference to the effect of the decision upon the contest

entirely changes the legal effect of the judgment. It is clear from the nature and the character of the decision, as well as the context, that the term "contestant," as used in this opinion, was intended to refer to the rights of those who were contesting the claims of the petitioner, and that the court did not intend to change the usual effect of the whole opinion and judgment by this clause relating to contestants. This is indicated by the language used: "It should *perhaps* be said that the rights of the contestants are not foreclosed by our decision herein, which is, *of course*, based upon the facts as stipulated by the *parties to this proceeding*." (Italics ours.) The court is merely calling attention to the self-evident proposition that the other applicants for the land were not bound by the stipulation entered into between the surveyor-general and the Churchill Company, "parties to the proceeding."

It follows from the foregoing that the trial court was in error in excluding the judgment and record in the *mandamus* proceeding, which record was conclusive against the Churchill Company. The trial court should have rendered judgment declaring that the Churchill Company had no right of purchase.

[3] No question is raised as to the sufficiency of the plaintiff's application. The question as to whether the land in question is segregated is discussed at length by the parties, but is immaterial, so far at least as plaintiff's claims are concerned. If the land is swamp and overflowed land, it is subject to sale, even if unsegregated, under the provisions of section 3493m of the Political Code (*McGill v. Cowan*, 179 Cal. 429, [177 Pac. 290]), and the appellant is entitled to have his application therefor granted, upon the elimination of the respondent's prior claim.

[4] In view of the conclusion of the district court of appeal in this case that the land is not swamp and overflowed land, but is sovereign land, and hence not subject to sale (*Churchill Co. v. Kingsbury, supra*), it is proper to state our view on that subject, although the parties all contend that the land is swamp and overflowed land and not sovereign land. The district court of appeal was of the opinion that the government surveys of 1873, of which it took judicial notice, established the character of the land as sovereign land. So far as the record in this case is con-

cerned, it is not shown that Little Klamath Lake is a navigable body of water. It is not one of the bodies of water so declared by statute (Pol. Code, sec. 2349) and whether actually navigable is not shown in the evidence, although the fact was stipulated in *Churchill Co. v. Kingsbury, supra*. The district court held that it appeared from the government maps above referred to that the meander line indicating the easterly shore of Little Klamath Lake was east of the land in question and that the land, therefore, was a part of the lake-bed and that this map established that the land in question was a part of the submerged land of a navigable lake and, therefore, belonged to the state by virtue of its sovereignty. On this basis it was held that the patent of the land issued by the Secretary of the Interior to the state of California for these lands as swamp and overflowed land was not binding upon the state of California, for the reason that the land had all along belonged to the state by virtue of its sovereignty, and that the action of the officer of the United States could not affect the title of the state.

It is clear that the district court of appeal was in error in its conclusion. The meander line was evidently run for the purpose of establishing the boundaries of the upland or agricultural land and not for the purpose of delimiting the boundaries of the lake. It does not purport on the face of the map to be the easterly boundary of the lake. On the contrary, to the west of this meander line is shown a large body of land indicated as tule or swamp and overflowed land; the acreage of each quarter-section and subdivision is indicated on the map and preceded by the letter "S," which indicates swamp and overflowed land. In the margin of the map of township 48 north, range 3 east, M. D. M., is an estimate of the amount of swamp and overflowed lands appearing upon the township map as 3,798 acres, which corresponds with the quarter-sections and subdivisions shown upon the map as swamp and overflowed land. The same is true as to the map of township 47, range 3 east, M. D. M., where the acreage of swamp and overflowed land is estimated on the map as 2,063 acres. On each map this acreage is indicated as swamp and overflowed land and is separated from the body of water designated as Little Klamath Lake by a heavy diagonal line, and the

land in question lies between the meander line on the east and this diagonal line on the west. The field-notes of the survey show that this diagonal line is the eastern boundary of the open water of the lake as distinguished from the land in question east thereof, which is covered with a dense growth of tules. We do not think that this court can declare as a matter of law, from facts of which it takes judicial notice, that the land is not swamp and overflowed land.

[5] This contest is one over the relative rights of the parties to purchase swamp and overflowed lands. Their applications are only for land of that character. The surveyor-general of the state was of the opinion that the land was swamp and overflowed land, and for the purpose of having the relative rights to purchase such land determined referred the contest to the superior court. The proceeding was not intended to determine the character of the land; the parties foreclosed inquiry on that subject by admitting the land to be swamp and overflowed land, as indeed they were bound to do, in order to secure the rights for which they were respectively contending. This was also the contention of the surveyor-general, who stood ready to issue his certificate of purchase or patent as swamp and overflowed land as soon as the relative priority of the parties was determined, while it is made the duty of the surveyor-general of the state to issue his patent or certificate to the successful party in the contest (sec. 3416, Pol. Code; *Laugenour v. Shanklin*, 57 Cal. 71, 75, 76; *Lobree v. Mullan*, 70 Cal. 150, [11 Pac. 685]; *People v. Morris*, 77 Cal. 204, 207, [19 Pac. 378]; *McFaul v. Pfankuch*, 98 Cal. 400, 402, 403, [33 Pac. 397]; *Youle v. Thomas*, 146 Cal. 537, 541, [80 Pac. 714]). The state, however, is not a party to the contest, and is not represented therein (*Cunningham v. Crowley*, 51 Cal. 128, 132, 133; *Polk v. Sleeper*, 158 Cal. 632, 636, 637, [112 Pac. 179]; *People v. California Fish Co.*, 166 Cal. 576, 611, [138 Pac. 79]), and is no more estopped by a judgment in such a contest than by the issuance of a patent by the surveyor-general without a contest. As was stated in *People v. California Fish Co.*, *supra*, concerning a patent of sovereign lands issued after such a contest: "Some of the patents in controversy in this series of cases were issued after and in pursuance of a land contest in the

courts, under section 3414 of the Political Code, as to the right of opposing claimants to purchase the land under the law. Such a contest does not estop the state from claiming and showing that the land was reserved, or that it was and is dedicated to public use. The judgment in such a case merely determines which, if either, of the claimants is a qualified purchaser (not whether the law authorizes a sale of the particular land, but which had the better right), and that the one found to be qualified and having the prior claim is entitled to purchase. The state is not a party thereto and public rights are not adjudicated or concluded thereby (*Polk v. Sleeper*, 158 Cal. 632, 637, [112 Pac. 179]). . . . ”

In the case of *Polk v. Sleeper*, *supra*, page 637, [112 Pac. 182], a land contest brought under sections 3415 to 3417 of the Political Code, before the superior court, it was said: “The only parties concerned in the action are the parties who properly become parties to the contest in the surveyor-general’s office and whose rights have been referred by that officer to the courts for adjudication, and prior to the amendment of section 3415 of the Political Code, in 1907, no other person could intervene in an action commenced under said reference. This was definitely settled in *Youle v. Thomas*, 146 Cal. 537, [80 Pac. 714], and reaffirmed in *Youle v. Thomas*, 150 Cal. 676, [91 Pac. 584]. The amendment of 1907 authorizes such an intervention only by one legally qualified to purchase from the state public lands of the same character, who, after the order of reference, presents his own application to purchase the land or a portion thereof, to the surveyor-general. The only questions involved in the action are those affecting the relative rights of the parties thereto. *The state is in no sense a party to the action.* . . . ” (Italics ours.)

[6] In this case we have the peculiar situation that this court in *Churchill Co. v. Kingsbury*, *supra*, upon a stipulation entered into by the attorney-general representing the surveyor-general, has declared the lands in question to be sovereign lands, notwithstanding the contention of the surveyor-general to the contrary. The attorney-general, in his brief filed herein, states that that stipulation, which was based upon “a careful reading of all the published reports which counsel was able to find from Fremont’s narrative,

1843, to the last report of the reclamation service," but that none of these reports revealed the facts now disclosed for the first time by the testimony of certain witnesses in this case, called by the Churchill Company, which had theretofore claimed the land to be sovereign land, to the effect that there is a relatively high embankment between the open water of the lake and the tule land, which bank is sooner uncovered by the evaporation of the water than the land farther east, and that this relatively high bank is cut by numerous channels, through which the water enters from the open water of the lake to overflow the tule land. We are not called upon to consider the effect of this evidence or whether it was sufficient to sustain the finding of the trial court that this land was swamp and overflowed land. That question was not an issue in the contest, and the introduction of such evidence was, therefore, wholly ineffectual and immaterial.

[7] The attorney-general appears herein as a friend of the court upon the theory that a decision herein that the land in question is sovereign land might prejudice the rights of the state as against the United States, growing out of a statute passed by our state legislature in 1905 (Stats. 1905, p. 4), ceding certain sovereign lands in Little Klamath Lake to the United States for reclamation purposes. Our decision on this contest cannot, of course, be binding upon the United States, which is not a party to this proceeding.

The judgment is reversed, with instructions to the trial court to proceed in accordance with this opinion.

Sloane, J., Shaw, C. J., Lennon, J., Richards, J., *pro tem.*, Waste, J., and Shurtleff, J., concurred.

Rehearing denied.

All the Justices concurred.



[Sac. No. 3011. In Bank.—December 13, 1921.]

W. B. FRANKLIN, Appellant, v. CHURCHILL COMPANY (a Corporation), Respondent.

[1] PUBLIC LANDS—CONTEST—JUDGMENT IN MANDAMUS PROCEEDING—LACK OF ESTOPPEL.—A judgment in a *mandamus* proceeding to compel the state surveyor-general to issue a patent to state land that the land was sovereign land is not conclusive upon a contestant of the petitioner's right to purchase, where such contestant was not a party to the *mandamus* proceeding.

APPEAL from a judgment of the Superior Court of Siskiyou County. James F. Lodge, Judge. Reversed.

The facts are stated in the opinion of the court.

Jacob P. Wetzel for Appellant.

A. E. Bolton and Tapscott & Tapscott for Respondent.

U. S. Webb, Attorney-General, and R. T. McKisick, Deputy Attorney-General, for State of California.

WILBUR, J.—[1] This case is a companion case to *Reynolds v. Churchill Co.*, ante, p. 543, [202 Pac. 865]. The record of the two cases is somewhat different, owing to the fact that in the trial court the attorney representing Franklin claimed throughout the proceedings that the supreme court had definitely determined in *Churchill Co. v. Kingsbury*, 178 Cal. 554, [174 Pac. 329], that the lands were sovereign lands and that, therefore, neither party had the right to purchase the same from the state of California. His supplemental complaint based upon the judgment of the supreme court in the *mandamus* case of *Churchill Co. v. Kingsbury*, supra, was not permitted to be filed. By this supplemental complaint the plaintiff in effect contended that the judgment in the *mandamus* case was conclusive against the defendant and incidentally admitted that it was conclusive against himself. In the latter position he was in error. Acting upon this belief the plaintiff declined to offer any evidence in the case and contented himself with the record he had made by the motion for leave to

file the supplemental complaint and by other motions and proceedings which need not be specifically pointed out. The judgment of the court being in favor of the Churchill Company, the plaintiff appeals to this court. While the more orderly process was that adopted in *Reynolds v. Churchill Co.*, namely, to proceed with the trial of the case and offer in evidence the judgment in the *mandamus* case (*Churchill Co. v. Kingsbury, supra*), it is clear that the appellant's position was sufficiently made known to the court and that the court decided against his contention and that he had no intention of abandoning his claims to the land except upon the theory that the trial court was bound to hold the land to be sovereign land.

In view of appellant's contention in regard to the conclusiveness of the judgment in the *mandamus* case, the judgment of the trial court should be reversed and the case remanded for subsequent proceedings in accordance herewith. If, upon a new trial, the plaintiff concedes, as he did on the former trial, that the land is sovereign land, the court should decree that he is not entitled to purchase the land, and upon presentation of the judgment in *Churchill Co. v. Kingsbury* must also decide against the defendant for the reason stated in *Reynolds v. Churchill Co., supra*.

Judgment reversed.

Sloane, J., Shaw, C. J., Lennon, J., and Shurtleff, J., concurred.

Rehearing denied.

All the Justices concurred.

[S. F. No. 9031. In Bank.—December 14, 1921.]

**EDWARD S. GOSLINER, Respondent, v. FRANK BRIONES et al., Appellants.**

- [1] **APPEAL—FINDINGS—INSUFFICIENCY OF EVIDENCE—SPECIFICATION.** Where a bill of exceptions contains nothing which even purports to specify wherein the evidence fails to sustain any of the findings, the contention that the findings are not supported by the evidence cannot be considered.
- [2] **FIXTURES—QUESTION OF FACT—INTENT.**—Whether or not in any case a building is permanently resting upon the soil so as to be deemed affixed to the land within the meaning of section 660 of the Civil Code remains a question of fact to be determined upon the evidence of that case, and, as a general rule, the intent of the parties is a controlling criterion.
- [3] **ID.—STRUCTURES ERECTED BY LICENSEE — OWNERSHIP.**—Where structures are erected upon land by a person who occupies the land with the permission or license of the owner, but who has no estate in the land, consent on the part of the owner of the land that the structures shall remain the property of the person erecting them will be implied in the absence of any other facts or circumstances tending to show a different intention.
- [4] **ID.—DAMAGES FOR DESTRUCTION—PLACE OF TRIAL.**—An action by a licensee to recover damages for the destruction of a dwelling and windmill erected by plaintiff on defendants' land was not improperly brought and tried in the county where two of the defendants resided, which was not the county in which the land was situated, since the action was based upon plaintiff's rights to the buildings as personal property.
- [5] **ID.—LIABILITY OF EMPLOYEE OF LAND OWNERS.**—An employee of land owners who joined with them in demolishing buildings with full knowledge that they belonged to and were the personal property of the plaintiff is liable for damages.
- [6] **EMPLOYER AND EMPLOYEE—JOINT TORT—LIABILITY.**—In the prosecution of actions for causes *ex delicto* all persons concerned in the commission of the tort may be joined as defendants, or either or any of them may be sued severally, and where an employer and an employee have participated in a tortious act against a third person, they may be jointly sued for damages.
- [7] **ID.—DAMAGES—EVIDENCE—COST OF REMOVAL OF DESTROYED BUILDINGS.**—In an action by a licensee to recover damages for the de-

struction of a dwelling and a windmill erected by him on land of defendants, where the agreement under which the buildings were erected required the plaintiff to remove the structures to his own land and the plaintiff sought to establish value merely by proof of the cost of construction, it was error to refuse defendants permission to prove the cost of removal in mitigation of the damage.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. W. H. Thomas, Judge presiding. Modified and affirmed.

The facts are stated in the opinion of the court.

George H. Harlan for Appellants.

Arnold C. Lackenbach for Respondent.

LENNON, J.—Plaintiff Edward S. Gosliner instituted the present action against defendants Frank Briones, William Latter, and Belle Latter for the purpose of recovering damages for the destruction of a certain dwelling-house and windmill alleged to have belonged to said plaintiff. Judgment was rendered in favor of plaintiff in the sum of twenty-five hundred dollars, the reasonable value of the demolished structures, and defendants appeal, relying upon a record consisting of the judgment-roll and a bill of exceptions. [1] Since the bill of exceptions contains nothing which even purports to specify wherein the evidence fails to sustain any of the findings, the contention that the findings are not supported by the evidence cannot be considered. (*Carter v. Canty*, 181 Cal. 749, 752, [186 Pac. 346].)

Summarizing the findings, then, we have the following facts before us on this appeal: In the year 1860 Charles A. Lauff sold to Pablo Briones an acre of land in Marin County, California, the deed being recorded at the time of the sale. Upon the death of Pablo Briones this land passed to his wife, Rafaela Briones, who, on January 25, 1915, deeded it to her son-in-law, defendant William Latter. In 1862, shortly after the sale of the land to Briones, Charles Lauff re-entered the said acre of land and from that year until May, 1916, it remained in the open, notorious, and continuous possession of the said Charles Lauff and various members of his family. In 1906 plaintiff Gosliner, the son-

in-law of Charles Lauff, erected upon this land a five-room dwelling-house and a large windmill. Neither of these buildings was firmly embedded in the soil; both were built upon heavy redwood mudsills placed upon the surface of the ground. Charles Lauff and his children consented to the erection of the buildings and it was agreed between them and the plaintiff that the buildings were not to remain permanently upon the land, but were to be left there only for a temporary period, until plaintiff was in a position to remove them to a near-by parcel of land which he owned. In the year 1915 defendant William Latter for the first time asserted his ownership in the aforesaid acre of land. A dispute concerning the title to the dwelling-house and windmill ensued, and ultimately, in September, 1916, defendants, without previous notice to plaintiff, entered the property and totally demolished and razed the said buildings. The trial court held that the buildings were personalty and the property of the plaintiff, and, accordingly, adjudged defendants liable for damages for their destruction.

Vital error was committed, defendants contend, in holding that the buildings did not pass as real property to the owner of the land upon which they rested, but continued to be personalty and remained the property of the person by whom they were erected. "Real or immovable property consists of: 1. Land; 2. That which is affixed to land; 3. That which is incidental or appurtenant to land; 4. That which is immovable by law." (Civ. Code, sec. 658.) "Every kind of property that is not real is personal." (Civ. Code, sec. 663.) Consequently the buildings in question were personalty unless they were "affixed to the land," for, obviously, only in that sense can they be brought within the above classification of real property. "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." (Civ. Code, sec. 660.) This section of the code is simply a rule for general guidance, concerning itself more with ultimate than with probative facts. [2] Whether or not in any case a building is "permanently

resting upon" the soil so as to be deemed "affixed to the land" within the meaning of the section remains a question of fact to be determined upon the evidence of that case. (*Pennybecker v. McDougal*, 48 Cal. 160; *Miller v. Waddingham*, 91 Cal. 377, [13 L. R. A. 680, 27 Pac. 750].) As a general rule, the intent of the parties is a controlling criterion in ascertaining whether property is permanently attached to the land or retains its identity as personalty; the character of the annexation to the land or other realty and the use made of the property are important considerations, but in most cases are subsidiarily employed for the purpose of testing the intention of the parties. (*Hendy v. Dinkerhoff*, 57 Cal. 3, [40 Am. Rep. 107]; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, [13 Am. St. Rep. 147, 22 Pac. 184]; *Jordan v. Myres*, 126 Cal. 565, [58 Pac. 1061]; *Western etc. Tel. Co. v. Modesto Irr. Co.*, 149 Cal. 662, 665, [9 Ann. Cas. 1190, 87 Pac. 190]; *Dutton v. Ensley*, 21 Ind. App. 46, [69 Am. St. Rep. 340, 51 N. E. 380].) In the present case the trial court found that the buildings were not embedded in the soil, but were constructed on mudsills placed upon the surface of the ground and that the plaintiff had no intention of permitting the buildings to remain on the land, but placed them there pursuant to an understanding that they should be removed therefrom. From these circumstances surrounding the erection of the buildings the trial court concluded that plaintiff never intended that his buildings should permanently rest upon the defendants' land, and this determination cannot be disturbed. (*Miller v. Waddingham*, *supra*.)

Defendants claim, however, that the intent of the plaintiff in placing the buildings upon the land is of no importance in the instant case, for the reason that there is no finding that the owners of the land agreed that they should remain personal property. It is claimed that the rule applies that improvements placed upon land by a stranger without an agreement permitting their removal follow the tenure of the soil on which they are erected. (Civ. Code, sec. 1013; *Collins v. Bartlett*, 44 Cal. 371; *McKiernan v. Hesse*, 51 Cal. 594; *Prescott & A. C. Ry. Co. v. Rees*, 3 Ariz. 317, [28 Pac. 1134]; *Crest v. Jack*, 3 Watts (Pa.), 238, 27 Am. Dec. 353.) But in the cases last cited there is no clear showing that the person placing the improvements upon

the land intended that they should continue separate and distinct from the realty; they are, for the most part, instances where a person has caused personal property to be annexed to real property of another without the latter's consent, with the intent that it should be permanently attached thereto but under a mistaken belief as to the ownership of the real property. In the present case there was, it is true, a mistaken belief concerning the ownership of the land, but, in addition to that, there was an intent that in any event the buildings should not remain upon or become a part of the realty, and, therefore, in view of this intent, it is doubtful whether, even under the rule relied upon by defendants, the buildings would be deemed to have become affixed to the land so as to pass to the owner of the soil.

It is, however, unnecessary to decide that question, for the facts of this case bring it within a well-settled exception to the above-mentioned rule. [3] Whatever the rights of a trespasser or entire stranger may be, the rule is that where structures are erected upon land by a person who occupies the land with the permission or license of the owner but who has no estate in the land, that is to say, by a mere licensee, consent on the part of the owner of the land that the structures shall remain the property of the person erecting them will be implied in the absence of any other facts or circumstances tending to show a different intention. (*Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, [43 Am. St. Rep. 491, 56 N. W. 821]; *Joplin Supply Co. v. West*, 149 Mo. App. 78, [130 S. W. 156, 161]; *Fischer v. Johnson*, 106 Iowa, 181, [76 N. W. 658].) There is no finding that the owner of the land granted Lauff or the plaintiff express permission to occupy the land, but a direct authorization is not essential to establish an occupancy by virtue of permission or acquiescence of the owner; a license may result from circumstances as, for instance, where a person has continued in possession for such a length of time and under such circumstances that objection might well have been expected had there been no assent. (*Fischer v. Johnson*, *supra*; *McCann v. Thilemann*, 36 Misc. Rep. 145, [72 N. Y. Supp. 1076].) The trial court found that Charles Lauff and members of his family had been in open, notorious, and continuous possession of the land from 1862 until 1916 and that the buildings erected by plaintiff remained on the



property without objection from 1906 until 1915. These findings, when considered in connection with the other facts found, are tantamount to a finding that Charles Lauff and his family were licensees and not mere trespassers, and since the findings do not show any facts or circumstances revealing a different intent upon the part of the owner of the land, the court below was correct in holding that the buildings did not become affixed to the land irrespective of plaintiff's intention that they should remain separate.

[4] Our determination of this point in effect disposes of the defendant's objection to the overruling of a demurrer to the complaint for lack of jurisdiction. The present action was brought in the superior court of the city and county of San Francisco, which defendants claim was without jurisdiction to try the case by reason of the fact that the land upon which the buildings were erected is situated in Marin County and that the present action involves the right to the use of that land. Section 5 of article VI of the constitution of California provides that "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions is situated," and section 392, subdivision 1, of the Code of Civil Procedure requires that actions "for the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property," shall be tried in the county in which the subject of the action, or some part thereof, is situated. The present action, however, is based upon plaintiff's right to the buildings as *personal* property, and it was solely upon that theory that he recovered judgment. The complaint practically alleged all title and interest in the land to be in defendant William Latter. It is true that there were allegations of facts tending to show that plaintiff was in the position of a licensee in erecting the buildings, but a mere licensee is but one remove from a trespasser and possesses no estate or interest in the land itself. (*Norfolk etc. Ry. Co. v. Denny's Admr.*, 106 Va. 383, [56 S. E. 321]; *Brown v. Boston & M. R. R.*, 73 N. H. 568, [64 Atl. 194, 199]; *Fischer v. Johnson*, *supra*.) It was, therefore, not improper to bring and try the action in the city and county of San Francisco,

where two of the defendants resided. (Code Civ. Proc., sec. 395.)

It appears from the findings that in 1917 Charles Lauff and his children instituted an action against defendants William and Belle Latter and others for the purpose of quieting title to the acre of land upon which the buildings here in controversy were erected "together with the improvements thereon." The judgment in that action, which is set forth in the findings in the present case, decrees that William and Belle Latter are the owners of the said land "together with the improvements thereon." Defendants contend that plaintiff claims through Charles Lauff and that he is, therefore, bound by the judgment against the said Lauff and his children and in favor of the said defendants. Assuming that plaintiff does claim through Lauff and his family, he is not prevented from suing for the value of the buildings he erected because of the judgment against Lauff. The findings of the present case disclose that the two buildings in controversy were totally destroyed in September, 1916, prior to the suit to quiet title. It is, therefore, evident that the words "improvements thereon" in the judgment in the suit to quiet title do not refer to the two buildings erected by plaintiff, which were not in existence at the time of that suit.

[5] The fact that defendant Frank Briones was an employee of defendants William and Belle Latter in removing the house and windmill does not relieve him from liability for his acts. The court found that defendant Briones joined with the other defendants in demolishing the buildings, with full knowledge that they belonged to and were the personal property of the plaintiff. [6] In the prosecution of actions for causes *ex delicto* all persons concerned in the commission of the tort may be joined as defendants, or either or any of them may be sued severally, and where an employer and an employee have participated in a tortious act against a third person, they may be jointly sued for damages. (*Rogers v. Ponet*, 21 Cal. App. 577, 581, [132 Pac. 851].)

[7] In one particular, however, error prejudicial to defendants was committed, namely, in a ruling respecting evidence concerning the amount of damages sustained by the plaintiff. The trial court found "That the reasonable

value of said dwelling-house at the time it was demolished by said defendants was the sum of twenty-two hundred and fifty (\$2250) dollars; that the reasonable value of the said windmill at the time it was demolished by said defendants was the sum of two hundred and fifty (\$250) dollars," and rendered judgment against defendants in the sum of twenty-five hundred dollars. The bill of exceptions shows that counsel for defendants made a formal offer to prove that it would have cost the sum of one thousand dollars to move said buildings from the acre of land upon which they were built to the land owned by plaintiff Gosliner, but the trial court refused to permit the introduction of this evidence and sustained plaintiff's objection thereto upon the ground that it was incompetent, irrelevant, and immaterial.

The following evidence as to the value of the buildings is contained in the bill of exceptions: Plaintiff testified, "I paid for all the work and all of the materials. The entire cost of the house and windmill to me was about twenty-five hundred dollars." A carpenter who worked on the house stated: "The value of this particular house was about twenty-five hundred dollars." Assuming that it cost twenty-five hundred dollars to build the house and windmill, nevertheless plaintiff had no right to maintain them on the premises where they were located. The agreement under which he built required him to remove the structures from the land on which they were erected to his own lots, a mile away. The difference between the cost of erecting similar buildings upon his own lots and the amount it would have to cost to remove the old buildings from defendant's land to his own lots, assuming the buildings to be equally valuable on both pieces of land, would represent the measure of the damages sustained by plaintiff as a result of the destruction. If the cost of construction is twenty-five hundred dollars, and the cost of removal would have been one thousand dollars, then plaintiff should not have been allowed more than fifteen hundred dollars damages. If the plaintiff had undertaken to establish the market value of the house as personal property subject to removal, evidence of the cost of removing the house to a particular lot would have been immaterial. But where he sought to establish the value of the house merely by proof of the cost of construction or its value where located, it was

proper to show the cost of removal of the house to the lot to which the plaintiff claimed he intended to remove it. (*Pennybecker v. McDougal*, 48 Cal. 160, 164.) It is clear that the finding of the court that the destruction of the buildings damaged plaintiff to the extent of twenty-five hundred dollars cannot be sustained in view of the showing in the record that the court refused to take into consideration the fact that the utilization of the buildings by plaintiff would have necessitated an expenditure by him of one thousand dollars. Defendants were entitled to introduce evidence upon the question of the cost of removing the buildings for the purpose of mitigating damages, and since the fact appears affirmatively in the bill of exceptions that the court made a ruling excluding material and competent evidence on this question, the judgment must be reversed.

The judgment is reversed.

Shurtleff, J., Wilbur, J., Sloane, J., and Shaw, C. J., concurred.

On petition for modification of judgment, the supreme court made the following order on January 13, 1922:

THE COURT.—The judgment of twenty-five hundred dollars as damages for the destruction of a certain dwelling-house and windmill belonging to the plaintiff having heretofore been reversed because of the erroneous ruling of the trial court refusing to permit the defendants to show in evidence, in diminution of damages, that it would have cost the plaintiff the sum of one thousand dollars to move the said buildings from the land upon which they were situated; and the plaintiff having, on the twentieth day of September, 1921, filed with his petition for a modification of the judgment a remission of the said sum of one thousand dollars, and an agreement that the judgment be modified by striking therefrom the sum of one thousand dollars, and as so modified stand affirmed, it is, therefore, ordered that the judgment of the superior court be modified by striking therefrom the sum of one thousand dollars, and as so modified that it stand affirmed, the plaintiff, however, to have his costs on appeal.

Lennon, J., Waste, J., Shurtleff, J., Shaw, C. J., Sloane, J., Lawlor, J., and Wilbur, J., concurred.

[L. A. No. 6874. In Bank.—December 15, 1921.]

In the Matter of the Estate of ELMER BARNES, Deceased.

[1] ESTATES OF DECEASED PERSONS—LETTERS OF ADMINISTRATION—RESIDENCE OF APPLICANT—FINDING—APPEAL.—A finding that an applicant for letters of administration was not a *bona fide* resident of the state at the time of his application will not be disturbed on appeal.

[2] ID.—DISQUALIFICATION OF NONRESIDENTS—CONSTITUTIONAL LAW.—The statute denying to nonresident heirs the right to administer upon the property of decedents in this state is not in violation of the fourteenth amendment to the federal constitution, which provides that no state shall deprive any person of life, liberty, or property, nor deny to any person within its jurisdiction the equal protection of the laws.

APPEAL from an order of the Superior Court of Orange County appointing an administrator. R. Y. Williams, Judge. Affirmed.

The facts are stated in the opinion of the court.

John A. Harvey for Appellant.

Head & Rutan for Respondent.

RICHARDS, J., *pro tem.*—This is an appeal from an order of the superior court of Orange County appointing Charles D. Brown, public administrator, as the administrator of the estate of Elmer Barnes, deceased, and denying the application of Hervey Barnes to be appointed such administrator. Elmer Barnes died intestate on or about January 5, 1920, at Wheaton, Illinois, being at the time of his death a resident of the county of Orange, state of California, and leaving estate consisting of an undivided half interest in certain real property therein. He left as his surviving heirs his father and mother, Hervey Barnes and Mary Barnes, who, up to the time of his death and for a long time prior thereto, resided in Wheaton, Illinois. On December 14, 1920, Ray-

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2. Right of nonresidents to act as executors or administrators, notes, 113 Am. St. Rep. 562; 3 Ann. Cas. 988; Ann. Cas. 1912A, 747; 1 L. R. A. (N. S.) 341.

mond C. Barnes, a brother of said deceased, filed a petition to be appointed administrator of the decedent's estate, whereupon the said public administrator filed a like petition, in which he alleged that said Raymond C. Barnes was not qualified to be appointed as such administrator for the reason that he was not entitled to share in the distribution of said estate. Thereupon Hervey Barnes, the father of said deceased, having received at his home in Illinois a telegram from his son, Raymond C. Barnes, stating that the latter was having some difficulty in being appointed administrator, and requesting him to come out as an heir of his deceased son and apply for letters of administration, came at once to California, arriving in Orange County on December 20, 1920, and filed his petition for letters of administration in said estate on December 30, 1920. The petition of Raymond C. Barnes was thereupon dismissed. Both of the other petitions came on for hearing at the same time, and the court, after taking evidence for and against each petition, made its order denying Hervey Barnes' petition upon the ground that he was not a *bona fide* resident of the state of California at the time, and granting the petition of the public administrator for letters of administration. This appeal is from said order.

It is the contention of the appellant that he was a *bona fide* resident of the state of California at the time of filing his petition to be appointed administrator of his son's estate, and as such was entitled to be appointed such administrator under section 1365 of the Code of Civil Procedure. This contention rests almost entirely for its support upon the testimony of the appellant himself that it was his intent in coming to California upon this occasion to become a *bona fide* resident thereof. The appellant argues that this expression of his intent, coupled with the fact of his presence in California at and after the time of the filing of his petition for letters of administration, are controlling upon the question of his qualification as a *bona fide* resident within the state to receive such letters of administration. In support of such contention the appellant cites *Estate of Newman*, 124 Cal. 688, [45 L. R. A. 78, 57 Pac. 686], wherein, upon a much similar state of facts, the probate court found in favor of the applicant and appointed her administratrix, and this court upheld such finding and the order making such appointment. The respondent, on the other hand, contends that, looking to

the record as a whole, there was sufficient evidence to justify the holding of the trial court that the appellant herein was not a *bona fide* resident of California at the time his petition for letters was filed; and the respondent upon his part relies upon *Estate of Donovan*, 104 Cal. 625, [38 Pac. 456], wherein, upon a state of facts almost identical with those of the instant case, the probate court denied letters to the petitioner, and upon his appeal this court upheld the finding and order of the probate court. In *Estate of Newman, supra*, the attention of this court was called to its decision in *Estate of Donovan, supra*, and to the similarity of the facts in each case, whereupon it made the following significant comment: "The difference between this case and the case of *In re Donovan*, 104 Cal. 623, [38 Pac. 456], is that there the court found against the petitioner as to the fact: In each case this court must abide the conclusion." [1] There is no escape from the application of a like conclusion to the instant case. The appellant, it is true, testified to his present intention to become and be a *bona fide* resident of the state of California and that such intent had been forming in his mind for about two years and ever since the occasion of a former visit to this state. But the evidence also showed his long residence in Illinois, where he had maintained the family home and where his aged mother, his wife, and certain of his children were still residing. The evidence also showed that his mother's age and infirmities were such that she could not be moved at the time, and that it was necessary that his wife should remain in Illinois to care for her for an indefinite period of time. It also appeared that while his son, Elmer Barnes, had died in January, 1920, leaving estate in California, the appellant had taken no steps toward coming to this state or acquiring a residence therein until, in the following December, his other son had telegraphed for him to come on and apply for the letters of administration, which he himself was unable to obtain. He then came hastily, bringing no property, and, upon his own statement, being obliged presently to return to Illinois for the purpose of so adjusting his affairs there as to make his removal to California feasible, depending upon the future condition of his mother's health. There can be no doubt that upon this state of the proof there was sufficient evidence to justify the finding of the probate court that the appellant was not, at the time



of his application for letters of administration, a *bona fide* resident of the state of California. Such finding and the order based upon it will not be disturbed upon appeal.

[2] The appellant makes the further contention that the statute denying to nonresident heirs the right to administer upon the property of decedents in this state is void as in violation of the fourteenth amendment to the federal constitution, which provides that no state shall "deprive any person of life, liberty or property, nor deny to any person within its jurisdiction the equal protection of the laws." This contention is supported by no authority and has no merit. The administration of estates is a matter of statutory regulation and the right to provide thereby for the temporary possession of the property of decedents for the purpose of paying their debts and distributing the residue of their estate among those entitled to succeed thereto has been universally recognized and upheld.

The order is affirmed.

Shaw, C. J., Wilbur, J., Sloane, J., Lennon, J., Waste, J., and Shurtleff, J., concurred.

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[S. F. No. 9405. In Bank.—December 15, 1921.]

A. J. SHIELDS, Respondent, v. RANCHO BUENA VENTURA (a Corporation), Appellant.

[1] CONTRACT—SERVICES FOR MANAGEMENT OF RANCH—COMPENSATION CONTINGENT ON PROFITS—RENDITION OF YEARLY ACCOUNTS—WAIVER.—Where a contract relating to the management of a ranch required the manager to keep proper books of account and to render an account annually, and provided for the payment of all expenses of operation before the payment of any compensation to the manager, and owing to the fact that the profits of the ranch were not in the form of cash, there was insufficient money to pay the manager at the end of the first and second years, and as a result payment of compensation was not asked, but the parties continued under the contract until the sale of the property, the right to a yearly settlement of accounts was waived by both parties, and the manager was entitled to full compensation upon proof of a profit each year equal to or in excess of the compensation.

- [2] **ACTION FOR SERVICES—EVIDENCE—BOOK ACCOUNTS.**—In an action upon claims alleged to have arisen in connection with the management of a ranch for a corporation, the corporation's books were admissible as containing the first permanent entries of the transactions in question, where the correctness of the books were attested by the secretary who made the entries and by the manager who furnished the original data from which the entries were made.
- [3] **ID.—PROFITS OF RANCH—INCREASE IN STOCK AND PRODUCE—CONSTRUCTION OF CONTRACT.**—Under a contract providing for the payment of all expenses of operation of a ranch before the payment of any compensation to the manager, the increased value of stock or produce on hand at the end of a given year over the value of stock or produce on hand at the end of the preceding year is to be treated as profits.

**APPEAL** from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge. Affirmed.

The facts are stated in the opinion of the court.

Short, Lindsay & Woolley for Appellant.

George Cosgrave and Frank Kauke for Respondent.

**LENNON, J.**—This is the second appeal prosecuted by the defendant corporation, Rancho Buena Ventura, from a judgment in favor of the plaintiff, A. J. Shields, in an action upon claims alleged to have arisen in connection with the management of a ranch in Shasta County, California.

The ranch was the property of the defendant corporation. Practically the entire capital stock of this corporation was owned by three persons—Frank Short, George Hoxie, and the plaintiff Shields. E. A. Mower was the secretary of the corporation and handled all its accounts. For several years prior to 1910 plaintiff had been in charge of the ranch, developing it and working under a salary. In 1910 plaintiff and defendant corporation entered into a contract under which plaintiff operated and managed the ranch from January 1, 1910, until the month of October, 1912, when the land was sold. The provisions of the contract which are of importance for present purposes may be summarized as

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2. Admissibility of party's books of account as evidence in his favor, note, 52 L. R. A. 545.

follows: Plaintiff was to have complete charge of the ranch and was to manage and conduct the same. It was agreed that: "The party of the second part [plaintiff herein] is to keep full and correct books of account showing all receipts and expenditures by him received, incurred or made in connection with said ranch, all business and the products thereof, and all of the same, and on the first day of January of each year the party of the second part will render a complete, full and correct statement of his accounts and transactions, receipts and expenditures." The proceeds of the ranch were to be applied in the following manner: After the payment of all expenses incurred in the management of the ranch, including the household and living expenses of himself and family, plaintiff was entitled to one thousand five hundred dollars each year in full payment for his services; all of the residue was the property of the defendant corporation. There was a provision that the contract should cease to operate upon certain contingencies, one of which was a sale of the premises, and, therefore, the agreement was terminated by the sale of the ranch in October, 1912.

In this action plaintiff seeks to recover compensation for his services, at the rate of one thousand five hundred dollars per year, or \$125 per month, for the period during which he managed the ranch under the above-mentioned contract, namely, from January, 1910, until October, 1912; he also asks repayment of a certain sum claimed to have been advanced by him in connection with the management of the ranch and not repaid by defendant. The first trial resulted in a verdict and judgment in plaintiff's favor for the sum of \$7,060.94, but the judgment was reversed by the district court of appeal (*Shields v. Rancho Buena Ventura*, 38 Cal. App. 696, [177 Pac. 499]); upon the second trial plaintiff voluntarily reduced his claim to \$5,742.52 and recovered a verdict and judgment for that amount. This latter sum is arrived at by computing plaintiff's salary at \$125 a month for thirty-four months, making a total of \$4,250, and allowing \$1,492.52 for money advanced for the use of defendant.

The decision of the district court of appeal in *Shields v. Rancho Buena Ventura*, 38 Cal. App. 696, [177 Pac. 499], reversing the first judgment in plaintiff's favor, must, as to all points of law therein passed upon, be taken as the law of the case upon retrial. Relying upon this fact, defendant

contends that the holding in that case was that plaintiff could not recover without a showing that he had rendered annual accounts to the defendant as required by his contract, and, inasmuch as it is conceded that plaintiff did not report to defendant concerning the state of his accounts at the end of each year during the time that he was managing the ranch, defendant deduces the conclusion that plaintiff has failed to make out a case under the law as established upon the previous appeal. This contention cannot be sustained for the reason that it is based upon an incorrect interpretation of the decision of the district court of appeal. In that decision it was held that "the operation of the ranch by the plaintiff was as to each year a separate and distinct transaction and not a continuous transaction for the entire period," and that, consequently, before plaintiff could recover for any year the compensation of one thousand five hundred dollars provided for by the contract, it must be made to appear that the net proceeds of the ranch for that year equaled that sum. At the first trial plaintiff made no attempt whatever to show the amount of the proceeds of the same for any one year, but merely introduced in evidence a single account covering the entire period from January, 1910, to November, 1912, and, accordingly, the judgment was reversed for the reason that "The jury, in the condition of the evidence upon which the cause was submitted, had no means of knowing whether for the years 1910 and 1911 there was anything due from the defendant to the plaintiff under the terms of the contract." Since the total lack of evidence concerning the annual profits of the ranch was the ground of the reversal of the first judgment in plaintiff's favor, it is apparent that the question of the effect of plaintiff's failure to render an annual report to the defendant was not within the issues decided upon the former appeal. Upon that appeal it was said: "There can be no doubt that the plaintiff was required by his contract to render an account annually; and it is apparent that without this annual account there was no basis upon which a settlement could be arrived at between the parties." Defendant interprets this to mean that plaintiff could not recover without proving an annual submission of accounts to the defendant, but that is not the purport of the quoted sentence. The keeping accounts, in annual periods and the submission of these accounts to the defendant at the end of

each year are distinct obligations, and the sentence in question may be paraphrased thus: The keeping of accounts in annual periods was indispensable to the performance of the contract by its very terms; the contract also called for the presentation of these accounts annually. But the annual presentation of the accounts was not of the essence of the contract. Plaintiff was not entitled to compensation until he proved that the amount of compensation claimed by him had been earned by the ranch during the year in which the services were rendered and, therefore, if plaintiff demanded that his compensation be paid precisely at the end of each year, it was incumbent upon him to report upon his accounts at that time. [1] It appears, however, that, owing to the fact that the profits of the ranch were not in the form of cash, there was insufficient money with which to pay plaintiff at the end of the years 1910 and 1911. As a result, plaintiff did not ask payment at the end of these years, but plaintiff and defendant continued under the contract, payment of the salary being deferred, until the sale in 1912. Under these circumstances it must be held that both parties waived the right to a yearly settlement of accounts. Therefore, if plaintiff can prove that there was each year a profit equal to or in excess of the sum of one thousand five hundred dollars, he is entitled to full compensation, irrespective of the fact that his accounts were not presented and settled annually.

[2] Proceeding in accordance with the ruling of the district court of appeal, plaintiff introduced evidence at the second trial showing, or tending to show, that he had kept a complete record of all transactions at the ranch by entries in memorandum-books, and that from these memoranda the secretary of the corporation subsequently posted up the corporation's books. The plaintiff's memorandum-books were not offered in evidence, for the reason that they were left upon the ranch when it was sold in 1912 and were subsequently burned, but the books kept by the secretary of the corporation were produced in court. The secretary testified regarding the manner in which he kept the books, that the entries therein were taken entirely from plaintiff's memoranda, and that these memoranda were correctly copied by him. Plaintiff himself testified concerning the completeness and accuracy of his own memoranda of the transactions

on the ranch. The books having thus been authenticated and their correctness attested by the party who made the entries and by the person furnishing the original data from which the entries were made, they were admissible as containing the first permanent entries of the transactions in question. (*Chan Kiu Sing v. Gordon*, 171 Cal. 28, [151 Pac. 657]; *San Francisco Teamsters' Co. v. Gray*, 11 Cal. App. 314, 319, [104 Pac. 999]; *Mercantile Trust Co. v. Doe*, 26 Cal. App. 246, 256, [146 Pac. 692]; *Chicago Lumbering Co. v. Hewitt*, 64 Fed. 314, [12 C. C. A. 129].) The books of account being properly admitted, it was not error to permit the plaintiff to read in evidence summaries of the accounts therein, for the purpose of avoiding delay. (Code Civ. Proc., sec. 1855, subd. 5.) Nor was error committed in admitting, in addition to these accounts, the testimony of the plaintiff concerning the transactions on the ranch during each of the years mentioned. If plaintiff was able to corroborate the accounts by testifying to facts from his own personal knowledge, certainly the admission of this testimony furnishes the defendant no ground of complaint.

[3] It appears from the accounts, and testimony, that there was not enough cash on hand to pay plaintiff's salary at the end of the years 1910 and 1911, but plaintiff contends that the gain is to be found in the value of the increase in stock and products, together with an increase in the permanent improvements on the ranch. Upon this phase of the case it was stated in the opinion of the district court of appeal upon the former appeal: "A proper construction of this contract, having in mind the conditions under which it was entered into and its objects and purposes, would treat as proceeds not only money received from actual sales of produce, but the increased value of stock or produce on hand at the end of a given year over the value of stock or produce on hand at the end of the preceding year; for it was the duty of the plaintiff, under his contract, to manage the business prudently and for the best interests of his employer, and it would not be to that interest that he should, in anticipation of the closing of the annual period, make hasty and ill-advised sales of produce merely for the purpose of having money on hand applicable to the payment of expenses and his own compensation." This interpretation of the contract is not attacked by defendant, and, placing this construction

upon the contract, the accounts and inventories put in evidence at the second trial, supplemented by Mr. Mower's and the plaintiff's testimony, reveal a net gain each year considerably in excess of one thousand five hundred dollars. The evidence is too voluminous to warrant setting it forth in this opinion. Suffice it to say that the evidence was sufficiently substantial to support the finding of the jury, which must be implied from the verdict, that the amount of the net proceeds resulting from the operation of the ranch each of the years in question entitled plaintiff to full compensation for his services under his contract.

The next question for consideration is plaintiff's right to reimbursement in the sum of \$1,492.52 for money alleged to have been invested by him in the ranch. The only question raised by defendant in connection with this phase of the case is whether or not there is sufficient evidence that that sum was actually advanced by plaintiff in the management of the ranch.

This must be ascertained from the summaries of cash receipts and disbursements. It may be stated, by way of preliminary explanation, that these accounts contained entries of the receipt and disbursement of some six thousand two hundred dollars, which was borrowed for use in the management of the ranch and repaid by plaintiff from the income from the ranch. An additional three thousand dollars, borrowed by plaintiff, was entered among the receipts of the ranch. At the termination of the agreement plaintiff had on hand a sum sufficient to repay this obligation. The transactions concerning this nine thousand two hundred dollars, and the payment of interest thereon, may, it is conceded, be eliminated from the accounts in determining the amount of cash received and disbursed in managing the ranch. Moreover, plaintiff's salary, although not actually paid, was entered among the disbursements as a matter of bookkeeping, because sufficient profits had in fact been earned to entitle plaintiff to the amount thereof. Eliminating the money borrowed from receipts and eliminating the money repaid, together with interest thereon, and the salary items from the disbursements, the accounts show that the excess of cash disbursements over receipts was approximately three thousand eight hundred dollars in the year 1910 and \$790 in 1911, while receipts were about \$3,082 greater than disbursements for the ten months of 1912, making a total of some one



thousand five hundred dollars excess of disbursements over receipts during the period of plaintiff's management. This fact, when considered in connection with the testimony of plaintiff that he received no money from the corporation for the management of the ranch, is sufficient evidence in support of plaintiff's claim to reimbursement to the extent that the expenditures exceeded receipts.

Defendant attacks this conclusion upon two grounds. It is first claimed that in this computation plaintiff has failed to credit defendant with one thousand dollars in cash which the cash account shows he had on hand at the time he started operations under the contract, and which, it is claimed, was the property of the defendant corporation. Mr. Mower, the secretary of the corporation, testified that this entry in the cash account of one thousand dollars "cash on hand" as of January 1, 1910, represented cash belonging to the plaintiff personally and not cash obtained from the defendant. The suggestion that this was hearsay testimony is of little weight in view of the fact that Mr. Mower was bookkeeper for the company, kept the books of the ranch both before and during plaintiff's management, and, therefore, was presumably thoroughly familiar with the financial affairs of the company. Moreover, plaintiff himself testified that the defendant never advanced any money for use on the ranch and the money in question is not listed in the inventory of the property of the corporation entrusted to plaintiff under the contract on January 1, 1910. Clearly, therefore, there is evidence to support the inference that this one thousand dollars appearing in the cash account was the property of the plaintiff and no more belonged to the defendant than the money borrowed by the plaintiff and repaid by him, which likewise found its way into the cash account.

The next contention of defendant is that, even conceding that this one thousand dollars expended in the management of the ranch was the money of the plaintiff, the latter's own testimony proves that there is no possible source from which he could have obtained the remaining \$492.52 claimed to have been advanced by plaintiff to the corporation and allowed him by the jury. Plaintiff testified, in effect, that on January 1, 1910, he had two thousand dollars in his own personal funds and that later he received a dividend of two thousand dollars. Aside from the one thousand dollars expended by him in the management of the ranch, this four

thousand dollars represents the total amount of plaintiff's personal funds while he was in control of the ranch. It is defendant's theory that the disposition of this money is entirely accounted for by plaintiff's testimony to the effect that he had spent some four thousand dollars in the support of his wife and children during the period between January 1, 1910, and October, 1912, and that it is, therefore, apparent that plaintiff did not have \$492.52 of his own money to expend for the corporation. The fallacy of this argument lies in defendant's interpretation of plaintiff's testimony concerning the amount of money spent by him in the support of his family. It is true that there is some confusion in plaintiff's testimony and that it is possible to interpret his testimony as estimating his expenses to have been as high as four thousand dollars. Nevertheless, the testimony will also support a lower estimate and, upon this appeal, it must be viewed in the light most favorable to plaintiff. In approximating plaintiff's personal expenses it must be remembered that the household and living expenses of plaintiff were, under the terms of the contract, paid from the income from the ranch and rated as part of the expense of managing the ranch, and that there was testimony that plaintiff's wife had money of her own and "always attended to her own buying."

Turning, then, to the testimony relied upon by defendant, it may be summarized, in the aspect most favorable to plaintiff, as follows: Plaintiff expended "around a hundred dollars a month" upon his three children during the time they were in school. Allowing for a three months' vacation, this would amount to nine hundred dollars a year. From January, 1910, until October, 1912, this would mean an expenditure of approximately two thousand five hundred dollars. Plaintiff estimated his own personal expenses, and those of his wife paid by him, at less than five hundred dollars, making a total of three thousand dollars. Even allowing a margin of five hundred dollars, this calculation shows that plaintiff would still have had sufficient cash to advance to the corporation the \$492.52 for which the jury allowed him reimbursement.

The judgment is affirmed.

Sloane, J., Wilbur, J., Shaw, C. J., and Shurtleff, J., concurred.

[Sac. No. 3173. In Bank.—December 19, 1921.]

**BESSIE BISINGER, Respondent, v. SACRAMENTO  
LODGE No. 6, BENEVOLENT AND PROTECTIVE  
ORDER OF ELKS, Appellant.**

- [1] **NEGLIGENCE—ELEVATOR ACCIDENT—REVERSAL ON APPEAL.**—In view of section 4½ of article VI of the constitution, the judgment in favor of the plaintiff in an action for personal injuries sustained while attempting to enter an elevator on the premises of the defendant will not be reversed on appeal for alleged errors relating to the right of the plaintiff to recover, where it can be said as a matter of law from the record that the operator was guilty of negligence and that the defendant was liable therefor.
- [2] **ID.—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**—In an action for personal injuries sustained while attempting to enter an elevator, instructions withdrawing the defense of contributory negligence from the consideration of the jury were not erroneous where the proximate cause of the injury was not, as pleaded by defendant, the entry of the elevator while in motion, but the negligence of the operator in the operation of the elevator after the entry and fall of the plaintiff to the elevator floor.
- [3] **ID.—JUDGMENT NOT EXCESSIVE.**—A judgment for \$28,191.91 in an action for personal injuries sustained in an elevator accident cannot be said to be excessive as a matter of law, where at the time of the trial, more than two years after the accident, the plaintiff was still able to get about only by the use of a wheel-chair, and her physician testified that one of her limbs was permanently injured, but that at some time she might be able to walk with the aid of a cane.
- [4] **ID.—TRIAL — ARGUMENT — DISCRETION.**—Where, after it was stipulated that both parties should have an hour in which to argue the case, the defendant, without previous notice to the plaintiff, waived argument, and thus took plaintiff by surprise, the court, in the exercise of a sound discretion, properly allowed the plaintiff to make further argument.
- [5] **ID.—OPERATION OF ELEVATOR—TESTIMONY OF PLAINTIFF—PHYSICAL IMPOSSIBILITY—JUDICIAL NOTICE.**—Judicial notice cannot be taken of the truth or falsity of the plaintiff's testimony as to the physical impossibility to have run the elevator after the accident as described by the witness.

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3. Excessiveness of verdicts in actions for personal injuries other than death, notes, Ann. Cas. 1913A, 1361; L. R. A. 1915F, 30.

**APPEAL** from a judgment of the Superior Court of Sacramento County. Chas. O. Busick, Judge. Affirmed.

The facts are stated in the opinion of the court.

Butler & Van Dyke, Ben P. Tabor, Irving D. Gibson and J. W. S. Butler for Appellant.

O. F. Meldon for Respondent.

**WILBUR, J.**—The facts are thus stated by the appellant: “This is an appeal of defendant, Sacramento Lodge No. 6, Benevolent and Protective Order of Elks, from a judgment upon a verdict in favor of plaintiff for damages for personal injuries sustained by her on June 22, 1918, while attempting to enter an elevator in the basement of defendant’s building in Sacramento, and alleged to have been received through the negligence of an elevator operator employed by defendant. A jury returned a verdict for \$39,975, but afterward, upon an order of the trial court that unless the sum of \$11,783.09 be remitted from the judgment, a new trial would be granted on the sole ground that the verdict was excessive, plaintiff by stipulation remitted that amount. As reduced by stipulation the actual amount of the judgment, from which this appeal was taken, is therefore \$28,191.91.

“**STATEMENT OF FACTS.**

“At the time of her injury plaintiff was a tenant of twenty-four rooms on the third and fourth floors of a building owned by defendant and known as the Elks’ Building. Plaintiff had become such tenant by assignment of a written lease made by defendant to one Mrs. M. Brown on May 31, 1911. The term of the lease had expired prior to plaintiff’s injury but plaintiff continued to hold over and occupied the premises under the same tenancy and was in such occupancy at the time of her injury.

“Defendant gave its written consent to the assignment of the lease to plaintiff and coincidentally with the assignment of the lease, on January 6, 1915, Mrs. Brown, the predecessor of plaintiff, executed to her a bill of sale of ‘all the furniture and household goods contained in those twenty-four (24) rooms and halls connected therewith’ described in the original lease. The bill of sale makes reference to the lease

'for the purpose of description and location of the rooms and building where the said furniture and household goods are situated.' Afterward, on February 24, 1916, plaintiff also executed to defendant, as security for her performance of the lease, a chattel mortgage embracing 'all of the upholstery, furniture and household goods,' etc., contained in the twenty-four rooms on the third and fourth floors of defendant's building, 'during the continuance of that certain lease agreement . . . for those certain premises consisting of the twenty-four rooms on the third and fourth floors of the said Elks' Building, which is hereinbefore particularly described . . . '

"The building in which plaintiff was tenant and where she was injured consists of four floors and a basement, or including the roof, a portion of which is used by defendant for its own purposes, five floors. An ordinary passenger elevator and shaft runs from the basement to the roof. The first or ground floor is occupied by stores and the lobby or entrance to the upper floors. The lodge and club rooms of defendant occupy the whole of the second floor. The third and fourth floors consist of offices and rooms rented to various tenants, including plaintiff. Practically the only use of the elevator is to carry persons from the entrance or lobby of the building on the first or ground floor to the upper floors. The elevator, however, can be taken to the basement floor of the building. There is a light-well in the center of the building over a part of the rooms on the fourth floor included in plaintiff's tenancy.

"Plaintiff was injured about 7 o'clock in the evening, as she was attempting to enter the elevator from the basement floor after she had gone to the basement of her own accord and for her own purpose to satisfy her curiosity as to the reason that water would not run on the roof. Plaintiff testified that her maid had previously gone up on the roof to sprinkle the roof and the light-well from a hose attached to a faucet on the roof, for the purpose of cooling the rooms occupied by her tenants on the fourth floor. Having been informed by the maid that the water would not run from the hose, plaintiff telephoned to one Ward, defendant's janitor, who was then alone in the clubroom of defendant on the second floor, concerning the failure of the water to run on the roof and asked him to see to it. Ward responded

that he could not do so just at that time as he was alone, but that he would see to it later, as soon as someone came to relieve him. Plaintiff then asked Ward the location of the faucet or valve in the basement connected with the water-pipe that ran to the roof and went herself to the basement in the elevator, examined the faucet, and in attempting to enter the elevator from the basement on her return tripped on the edge of the floor of the elevator, fell and was injured, plaintiff alleges, through the negligence of the elevator operator.

“According to the testimony of her surgeon, plaintiff sustained a severe crush of the left leg, above the ankle, with a compound fracture of the tibia.”

The respondent, in stating the facts, adds the following:

“In order to reach the basement, respondent signaled for the elevator, and was carried therein to the basement floor. The elevator being at the time under the control of, and operated by, an employee of appellant. After respondent had completed her mission she returned to the point where the elevator could be taken on return to her own apartments in the building on the fourth floor thereof. The usual means of ingress and egress to and from the elevator, and device for signaling the elevator, were provided for at the basement floor.

“Respondent signaled for the elevator, in other words, respondent rang the bell provided for the purpose, in response to which the elevator was brought to the basement. The operator stopped the elevator some distance above the floor, and then, after lowering it some more, opened the door for respondent to enter. According to plaintiff's version of what then happened, the operator, just as respondent stepped into the elevator, started it suddenly upward, throwing respondent off her balance and causing her to fall upon the floor of the elevator with her left foot extending beyond the edge of the elevator floor. The elevator continuing in its ascent, respondent's left foot was caught between the floor of the elevator and the casing of the first floor of the building, crushing and breaking the tibia and fibula of respondent's left leg just above the ankle. The operator then ran the elevator up to the fourth floor and back to the basement several times, the respondent still lying upon the floor, unable to rise, suffering intense pain and her foot hanging by

the skin and stretched tendons under the floor of the elevator. Upon one of these obviously needless and uncalled for passages of the elevator up and down the elevator shaft, respondent, in her agony, changed her position, and her right foot was also caught, as the left had been, and the toes thereof were crushed and broken."

The only dispute in the testimony is as to the manner in which plaintiff was thrown to the floor. Plaintiff testified that after she entered the elevator it started with a sudden jerk, which threw her to the floor in a sitting posture, with her left foot extending beyond the edge of the elevator. The elevator-man, J. W. Allen, testified that he had stopped the elevator slightly above the basement floor and that plaintiff started to step in the elevator just as he started to lower, and that plaintiff caught her foot under the elevator floor and stumbled into the elevator with her foot extending beyond the edge; that he saw her lying on the floor of the elevator with her foot extending beyond the edge of the elevator. The testimony of the elevator-man was given by deposition and, acting under the instruction of defendant's counsel, he refused to answer all questions as to what occurred thereafter. The only evidence as to what occurred in the elevator after she was on the floor with her foot extending over the edge of the elevator is that of the plaintiff, who testified as above stated, and that, after her leg was broken, the operator continued up to the fourth floor and returned to the basement, went from the basement to the third floor and back and from the basement to the second floor twice, and then finally stopped the elevator while it was between the first and second floors. According to plaintiff's testimony, each time they passed a floor her leg was struck in such fashion that she suffered great agony. This occurred about twenty-three times. During this entire period she was crying in agony and begging and beseeching the operator to stop the elevator.

[1] We have stated the facts somewhat fully because of the constitutional provision which prohibits us from reversing the case unless there has been a miscarriage of justice. In view of the fact that it can be said as a matter of law from these facts that the elevator operator was guilty of negligence, and that the defendant was liable for such negligence, whatever her relation to the defendant may have been, many



questions raised by the defendant and appellant are immaterial.

The appellant claims that the complaint does not state a cause of action because it does not allege the relation of passenger and carrier; that the court erred in denying defendant's motion for a nonsuit; that plaintiff had no right by virtue of her tenancy to go to or from the basement in the elevator; that plaintiff's failure to show she was a "passenger" is fatal to her cause of action; that plaintiff was a trespasser and only entitled not to be wantonly injured; that plaintiff failed to show permission to use the elevator; that the instructions that plaintiff was a "passenger" and entitled to the highest degree of care were erroneous; that the use of the basement by consent or acquiescence made plaintiff a licensee only; that if plaintiff was not a trespasser she was a mere licensee and defendant was required to use only ordinary care toward her; that the defendant owed only ordinary care for the further reason that it was a carrier without reward; that the issue as to plaintiff's right to be in the elevator was withdrawn from the jury by the instructions; that whether plaintiff was a passenger was a question of fact for a jury and was made an issue by the pleadings; that the court erroneously refused to instruct that unless plaintiff's right to be in the basement was shown she could not recover; that the jury were erroneously instructed that plaintiff could recover even if guilty of contributory negligence; that the attempted instructions as to last clear chance failed to embrace all the elements and were erroneous; that the last clear chance rule was not applicable to complaint or evidence; that the instruction as to measure of damages was erroneous; that the court erred in admitting evidence of statements by plaintiff's predecessor and of conversations between plaintiff's predecessor and the janitor of defendant; that the court erred in permitting plaintiff to testify as to the present use of the basement and elevator; that the court erred in permitting a former janitor of defendant to testify concerning the use of the basement; that the court erred in refusing to permit the secretary of defendant to be asked whether plaintiff had any permission to go to the basement to attend to the water supply; that it was error to admit evidence of loss of profits from farming certain lands; that the court erred in stating that it would instruct the jury as

to facts proven; and that it was reversible error to permit plaintiff's counsel to make a second argument to the jury after defendant had waived its argument.

In view of the constitutional rule (art. VI, sec. 4½) that "No judgment shall be set aside, or new trial granted in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," the case cannot be reversed for these reasons.

All the errors complained of relate to the right of the plaintiff to recover for the injury which she suffered, and, in view of the fact that she was invited to enter the elevator and accepted the invitation to enter therein and was thereafter injured by the negligent management of the elevator by the employee of the defendant, who knew that she was lying helplessly in a position which must necessarily have resulted in her injury if the elevator was moved before she had an opportunity to withdraw her foot from a position of danger, it is unnecessary to consider in detail the points made by the defendant, for it is clear that there has been no miscarriage of justice in holding the defendant liable for plaintiff's injuries.

[2] The defendant claims that certain instructions given by the court to the jury withdrew the defense of contributory negligence from their consideration. Defendant had pleaded that the plaintiff was guilty of contributory negligence in that she entered the elevator while it was in motion. The only evidence in that regard is the evidence of the elevator-man that he had stopped the elevator a short distance above the floor of the basement, and that just as she was stepping in he lowered the elevator and her foot caught under the floor of the elevator, so that she stumbled into the elevator. Assuming that this evidence is true, neither her entry into the elevator while it was in motion, if it was, nor her fall was the proximate cause of the injury. The injury was caused by plaintiff's leg coming in contact with the floors of the building above the point where she stumbled and resulted not from the descent of the elevator at the

time she stumbled, but the ascending of the elevator after she was lying upon the floor of the elevator. It can be said as a matter of law that the fall of the plaintiff into the elevator was not the proximate cause of the injury. Therefore, even if the instructions complained of had the effect asserted by counsel of withdrawing the issue of contributory negligence from the jury, they were not erroneous.

The other questions raised by the appellant relate to the measure and amount of damages.

[3] At the time of the trial, more than two years after the time of the accident, the plaintiff was still able to get about only by the use of a wheel-chair. She was unable to bear her weight upon her left leg and suffered some pain when she bore her weight upon her right leg. The physicians who testified in the case agreed that for the time being her injuries were total and were to some extent permanent. The witnesses agreed that, in the absence of an operation to correct the disability, she would not be able to put her left heel to the floor. The physician called by the defendant testified that, while she would suffer some permanent limitation of the functions of the left foot and ankle, such defects could be so far cured by an operation that the total disability of the left leg would be less than ten per cent—that is to say, she would ultimately recover more than ninety per cent of the function of the limb. On the other hand, the plaintiff's physician testified that the limb was permanently injured and it was impossible to tell how long it would be before she would be able to walk upon the limb, but that she might at some time be able to walk with the aid of a cane. The jury were at liberty to accept the testimony most favorable to the plaintiff and evidently did so.

It is claimed that the judgment is excessive. The rule on that subject on appeal is thus stated in *Hale v. San Bernardino etc. Co.*, 156 Cal. 713, 715, [106 Pac. 83]: "The amount of damages in such cases is committed first to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly

and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.' '' We cannot say that the verdict is excessive as a matter of law.

[4] It had been stipulated that both parties could have an hour in which to present their case to the jury. After plaintiff had closed its opening argument, the defendant waived its argument and the court permitted the plaintiff to further argue to the jury. This is claimed to be error. The plaintiff had evidently planned to have Mr. Meldon open and Mr. Gett close the argument, each to take one-half hour, and was undoubtedly surprised by the defendant waiving argument. The plaintiff thereupon requested that William A. Gett be permitted to address the jury for one-half hour. The court thereupon stated that he would grant the request and offered to allow the defendant to withdraw its waiver of argument and to proceed with its argument for one hour, in accordance with the stipulation, if defendant desired to do so. After consultation, defendant's counsel declined to argue the case, contenting themselves with an objection to the plaintiff's further argument. The court, over defendant's objection, thereupon permitted plaintiff's counsel to argue the case further to the jury. If, after stipulating that each side should have an hour for argument before the jury, the defendant, without previous notice to the plaintiff, waives argument and thus take the plaintiff by surprise, the court, in the exercise of a sound discretion, should allow the plaintiff whatever argument to the jury is necessary in order to overcome the effect of the surprise. And, similarly, should allow the defendant whatever argument was necessary in order to prevent any prejudicial result flowing from the fact that it waived argument before it knew that the court would permit further argument by plaintiff. This was done in this case. The ruling of the court was not erroneous, but proper.

[5] In the appellant's reply brief we are asked to take judicial notice that an elevator is fitted so closely into the shaft as to leave practically no space between the edge of the floor and the wall of the shaft, and that it was a physical impossibility to run the elevator to the top story and back again, as described by plaintiff, because there was barely room enough for clearance of the elevator itself. Appellant

states: "Plaintiff's recital of the accident was manifestly not only grossly exaggerated but actually untrue, as it is clear that her injury must have occurred through her limb striking the ceiling of the basement. These embellishments were obviously added by her for the purpose of arousing the prejudice and sympathy of the jury." As no punitive damages were asked or allowed, the question of how many times the elevator was moved up and down is immaterial except as it indicates the amount of suffering inflicted upon the plaintiff and the degree of negligence of the elevator-man, and the truth or falsity of the plaintiff's testimony was to be determined by the jury. We cannot take judicial notice that it was false.

Judgment affirmed.

Waste, J., Shaw, C. J., Lennon, J., Sloane, J., and Shurtleff, J., concurred.

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[S. F. No. 9935. In Bank.—December 19, 1921.]

SEID PAK SING et al., Respondents, v. HARRY B. BARKER et al., Appellants.

[1] MORTGAGE—FORECLOSURE SALE—APPEAL—STAY OF PROCEEDINGS.—

A decree declaring the amount due on a mortgage and providing for its payment within seventy days and, if not paid, that the property be sold in satisfaction of the indebtedness and a judgment entered for the deficiency, if any, is a judgment directing a sale of real property within the meaning of section 945 of the Code of Civil Procedure, and a stay bond on appeal is necessary to stay the sale.

[2] ID.—APPEAL BY MORTGAGEES—PORTION OF JUDGMENT—SUPERSEDEAS.

A writ of *supersedeas* will not issue to stay a foreclosure sale because of the mere fact that the mortgagees also took an appeal from the portion of the judgment fixing the amount due on the mortgage, since the determination of the appeal could not reduce the judgment below the amount allowed.

APPLICATION for a Writ of Supersedeas to stay foreclosure sale. Denied.

The facts are stated in the opinion of the court.

Elston, Clark & Nichols, Miller, Thornton & Miller, Sloss, Ackerman & Bradley and Platt Kent for Appellants.

A. H. Ashley and Sterling Carr for Respondents.

WILBUR, J.—The defendants apply to this court for a writ of *supersedeas* on two grounds: First, that their appeal is taken from an interlocutory judgment upon which they are not required to give a stay bond, and, second, that the plaintiffs, having appealed from a portion of the judgment, cannot take advantage of the portion in their favor not appealed from, because plaintiffs have by their appeal selected a remedy which is inconsistent with the enforcement of the balance of the judgment, because the portions of the judgment appealed from are inextricably interwoven with the portion from which no appeal is taken.

The plaintiffs' mortgage upon 970.93 acres of land was subject to a prior trust deed thereof given to secure an indebtedness of \$35,000 and certain advances. Plaintiffs brought this action to enjoin the sale of the land by the trustees for nonpayment of the indebtedness secured by the trust deed, and to have the amount of the indebtedness so secured fixed so that plaintiffs could redeem the property from said trust deed. The trustees claimed the amount of the indebtedness so secured to be \$186,000.

By cross-complaint the defendant Grossman, who owned the mortgaged property, sought similar relief against the plaintiffs' mortgage, as the amount admittedly due thereunder was less than \$25,000 and plaintiffs were claiming that more than \$400,000 was due thereunder, as alleged in plaintiffs' answer to this defendant's cross-complaint. The trial court fixed the amount due upon the trust deed entitled to priority over plaintiffs' claim at \$37,091.70, plus \$305 taxes, and the amount due upon plaintiffs' mortgage at \$133,452.27, and provided that the plaintiffs could redeem from the trust deed by paying the clerk of the court the amount due within sixty days, and upon deposit of said trust deed and note thereby secured, properly indorsed and assigned to plaintiffs. The decree further declared that the amount due on the mortgage was \$133,452.27 and provided for the payment thereof by the owner within seventy days, and that if the amount of plaintiffs' mortgage

was not paid within seventy days the property should be sold in satisfaction of the indebtedness found to be due to the plaintiffs, and that a judgment be entered for the deficiency, if any. The time for redemption has expired and it is not contended that the mortgage has been paid or the amount due tendered. [1] The code provides that, upon an appeal from a judgment directing a sale of real property, a bond must be given to stay the proceedings, the amount thereof which must be fixed by the court. (Code Civ. Proc., sec. 945.) No such bond was given. This is such a judgment. The sale could be stayed or prevented by payment of the amount due within seventy days, or by giving a stay bond on appeal. The fact that the judgment itself in effect gave a stay of seventy days does not justify a stay on appeal without a stay bond. It matters not whether the judgment be considered as interlocutory or final. The defendants are not entitled to a supersedeas on their own appeal.

[2] Notwithstanding defendants' failure to give a bond, they seek to have a writ of *supersedeas* issued by this court because of the plaintiffs' appeal from portions of the decree denying its claim for judgment for \$260,000 more than was given. In order to more clearly present the defendants' position, it will be necessary to state other facts. The defendant Grossman's predecessor rented 970.93 acres of land to plaintiffs at the rental of \$25.50 per acre for the year 1918 and \$26 per acre for the year 1919. The plaintiffs were to pay the rentals in advance and have paid \$35,000 in rentals. The land at the time of the agreement was swamp and overflowed land, incapable of cultivation without reclamation. Grossman's predecessor agreed to have a portion of the land ready for cultivation on February 1, 1918, and the balance March 1, 1918. Only 152.20 acres were ready for cultivation by the plaintiffs in 1918 and 382.90 acres in 1919. The mortgage was given to them to secure the performance by the landlord of the terms of the lease. Plaintiffs claim the return of \$22,140.55 on the rental of land not delivered to them, expressly agreed to be refunded by the terms of the lease, and the sum of \$7,565.43 for levee work, \$410.06 for a siphon, \$6,855.03 for expense of pumping, and \$96,418.20 for damages to the plaintiffs' growing crop in 1918, due to flooding. These items were allowed by the trial court, aggregating \$133,457.27. The court de-



nied the plaintiffs prayer for loss of profits due to the failure to deliver the land as agreed, amounting to over \$250,000, and it is from this portion of the judgment only that plaintiffs appeal.

It is claimed that to enforce the judgment for the amount found due by the court would be inconsistent with the prosecution of the appeal, for the reason that the allowance of damages for lost profits on the undelivered acreage is inconsistent with the allowance of a rebate of rents as provided in the lease for the same land. However that may be, on plaintiffs' appeal the amount of judgment cannot be reduced below the sum already allowed to them, and the only question is whether or not the amount of the judgment can be increased. If, as the plaintiffs claim, there is an inconsistency between the recovery by the plaintiffs of the amount provided in the lease for a failure to deliver to them the land leased and the right to also recover damages because of loss of profits for such nondelivery, such question goes to the merits of plaintiffs' appeal, and, however determined, could not result in the decrease of the amount of the judgment in favor of the plaintiffs. There is, therefore, no such inconsistency between the appeal and the rights of the plaintiffs to enforce the judgment as would either justify or require a stay of execution.

It is unnecessary, we think, to review the many cases cited by the petitioners, as both parties agree that no writ can be issued unless there is such inconsistency between the right of appeal and the right of execution to enforce the judgment as require the plaintiffs to elect between the two remedies, and no such inconsistency exists.

The petitioners contend that a sale under execution in foreclosure before the entire amount due is ascertained on appeal would in some manner violate section 726 of the Code of Civil Procedure, which prohibits more than one action for the foreclosure of a mortgage. There is nothing in this point, as this action will be the same single action after the sale as before, the sale being only one step in the foreclosure proceeding, the ascertainment of the deficiency, if any, being another. It should be said in this connection that it is not contended that the property is worth the amount of the liens thereon, as declared by the court.

If authority is needed for such obvious conclusions stated by us, the cases cited below will be sufficient, and, for the reason stated, we deem it unnecessary to enter into a detailed discussion thereof. (*Stetson v. Sheehan* (Cal. App.), 200 Pac. 387 [rehearing denied]; *Whalen v. Smith*, 163 Cal. 361, 363, Ann. Cas. 1913E, 1319, 125 Pac. 904]; *Ganahl Lumber Co. v. Weinsveig*, 168 Cal. 664, [143 Pac. 1025]; *Lake v. Superior Court*, ante, p. 116, [200 Pac. 1041]; *Goodlett v. St. Elmo Investment Co.*, 94 Cal. 297, [29 Pac. 505]; *First Nat. Bank v. Wakefield*, 138 Cal. 561, [72 Pac. 151].)

The petition for a writ of *supersedeas* is denied.

Sloane, J., Lennon, J., Shaw, C. J., and Shurtleff, J., concurred.

Rehearing denied.

All the Justices concurred.

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[L. A. No. 6809. In Bank.—December 20, 1921.]

FLORENCE RITCHIE DEARBORN, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

- [1] WORKMEN'S COMPENSATION ACT—REVIEW OF PROCEEDINGS—POWER OF COURT.—An annulment of an award of the Industrial Accident Commission is authorized only when the commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, or when the findings of fact do not support it.
- [2] ID.—COMPENSATION FOR DEATH—NONCASUAL CHARACTER OF EMPLOYMENT—SUFFICIENCY OF EVIDENCE.—In this proceeding to review an award of compensation for death, the finding that the employment of the deceased was not casual under section 8 (c) of the Workmen's Compensation Act of 1917 is held to be supported by the evidence and, as a consequence, that the commission did not exceed its jurisdiction in making the award.

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1. Review of facts under Workmen's Compensation Act, notes, Ann. Cas. 1916B, 475; Ann. Cas. 1918B, 647.

2. Who are casual employees within the meaning of Workmen's Compensation Acts, notes, L. B. A. 1916A, 120, 247, 365; L. B. A. 1917D, 147; L. B. A. 1918F, 202.

PROCEEDING in Certiorari to review an award of the Industrial Accident Commission. Award affirmed.

The facts are stated in the opinion of the court.

Jerome H. Kann for Petitioner.

A. E. Graupner and Warren H. Pillsbury for Respondents.

WASTE, J.—This is a proceeding brought to review, and have annulled, an award of the respondent, the Industrial Accident Commission. S. E. Hayden was killed on March 24, 1920, while working as a carpenter for Florence Ritchie Dearborn, the petitioner herein. The accident was caused by his being thrown from an automobile while on his way to a telephone to order lumber needed in the erection of the building on which he was working. He left surviving him the other respondents, a widow and three minor children, who were dependent upon him for support. The employer denied any liability for compensation for the death of Hayden, and the dependents made due application for an adjustment of the claim. There were two hearings before the commission. On the first the applicants were awarded the sum of \$4,999.98. That decision was confirmed on the rehearing. Thereupon the petitioner brought this proceeding in review.

The defendant before the commission, the petitioner here, denied liability for compensation in the matter of Hayden's death upon the ground that his employment was both casual and not in the course of petitioner's trade, business, profession, or occupation. There was ample proof that Hayden, at the time of receiving the injuries from which he died, was actually performing services for Mrs. Dearborn. The burden was, therefore, cast upon petitioner to prove that the deceased was an independent contractor in the matter, or otherwise excluded from the provisions of the Compensation Act. (Workmen's Compensation Act, sec. 19d, Stats. 1917, p. 849.) She was unsuccessful before the commission, which found that the employment of Hayden was not casual, and made the award. The correctness of that finding presents the only point of controversy on the hearing.

The material facts appear without conflict. Mrs. Dearborn, the petitioner, is associated with her husband in ranch-

ing near Blythe, in this state. Being desirous of having a small dwelling-house erected for the occupancy of her brother and his family, she employed the deceased Hayden to attend to the matter for her. She ordered the lumber and paid the labor bills. Her testimony relating to the employment is that "he [Hayden] was to build that little house at Fertilta. He was to receive his pay by the day; that was what he asked; he did not ask for pay any other way. I employed him. I authorized him to employ the other carpenters. There was no understanding with him that I would give him a lump sum of money for building the house so that he could pay them; the arrangement was hurried; there was nothing said about help. Ultimately the price [for the help] would come out of my pocket. The only sum that was mentioned was the amount he asked me for his services by the day—that was \$8.50. That is what I agreed to pay him. There was no provision whatever in the arrangement with Mr. Hayden by which a sum of money was to be paid to him for building this house, out of which he could pay these other men." It appears, also, that Mrs. Dearborn bought and paid for all the lumber and materials used in the erection of the building. It seems conclusively established, therefore, that the deceased was not an independent contractor in building the house. Was he otherwise excluded from the protection of the act? To have worked this result his employment must have been both casual and not in the course of the business or occupation of his employer. As before stated, Mrs. Dearborn was engaged, with her husband, in farming. Respondents do not contend that the employment of Hayden was in the course of that business. Hence the inquiry narrows to a consideration of the alleged nature of his work.

The relevant portion of the Workmen's Compensation Act, section 8(a) (Stats. 1917, p. 835), provides that the term "employee," as used in sections 6 to 31, inclusive, of the act, shall be construed to mean "every person in the service of an employer, . . . but excluding," among others, any person whose employment is casual. Section 8(c) of the act provides that the term "casual" "shall be taken to refer only to employments where the work contemplated is to be completed in not exceeding ten working days, without regard to the number of men employed, and where the total

labor cost of such work is less than one hundred dollars." The application of this test to the facts of the case presents the question to be determined.

[1] At the outset of this inquiry we may repeat what was said by the present chief justice in *Southern Pac. Co. v. Industrial Acc. Com.*, 177 Cal. 378, 380, [170 Pac. 822]; "This court, in reviewing awards of the commission, is not acting as a court of appeal. It has no power to weigh the effect of positive evidence. It must assume that the commission believed all the evidence given which tends to sustain the award made. . . . Section 84 [sec. 67 of the present act] of the Workmen's Compensation Act, which gives us the power we are now exercising over this award of the commission, authorizes us to annul an award only when the commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, or when the findings of fact do not support it. The findings are not subject to review except in so far as they may have been made without any evidence whatever in support thereof. The review of the findings, even in such cases, is not based on the theory that they are not supported by the evidence, and that we are weighing evidence to determine that proposition, but upon the theory that the commission has no jurisdiction to make a finding where there is no evidence to support it." This restatement of the power of the court on review in these proceedings is pertinent, for the reason that the petitioner takes the position that there was no evidence in this proceeding below to support the finding of the non-casual character of Hayden's employment, and that, as a consequence of such absence of fact, the commission exceeded its jurisdiction in making the award. If the petitioner's contention is correct the award must be annulled, otherwise it must stand.

According to the testimony before the commission, Mrs. Dearborn contemplated the construction of a small dwelling on property to be purchased, to be occupied by her brother and his family. She wanted the work to be done quickly, Consequently, she talked the matter over with the decedent, and employed him in the manner already shown. She was assured by Hayden that the work would take three or four days. Mrs. Dearborn and Hayden, together, ordered the first list of materials for the building. Hayden secured two

carpenters to work with him on the job for two or three days, agreeing to pay them \$8.50 per day, the same wages he was to be paid by the petitioner. The work was commenced on Wednesday, and had not proceeded far before the carpenters found they were short the amount of milling needed for the building. Hayden started to go to a near-by store to telephone to the lumber company about the shortage of material. He had not gone far when Mr. Ritchie, brother of Mrs. Dearborn, for whose use the latter was building the house, volunteered to take him to the store in his automobile. On the way Ritchie turned suddenly to avoid running down a chicken. As the auto swerved back into the roadway, which was in the sand, Hayden was thrown out, coming into violent contact with the ground, and sustained the injuries which resulted in his death. The work on the building was interrupted for a short time on the day of the accident, and for a like period on the day Hayden was buried. Lumber and materials for the job, costing in all \$454.39, were ordered, from March 24th to and including April 9th. It was used in the building. Mrs. Dearborn testified that workmen were on the job all the time between those dates. Switzer, the last of the carpenters to be paid off, received a check dated April 10th. He testified that he worked but eight, nine or ten days, but the fact remains that the materials were being furnished to and were used in the erection of the structure by someone over a period far in excess of ten days. The total cost of the labor for the building was \$189.15. On the foregoing evidence the commission based its findings and made the award.

The petitioner seeks to avoid the effect, and compelling force, of the evidence already summarized, by asserting that, while the cost of the labor on the finished house and the length of time consumed in its erection unite to remove the work of decedent from the category of a "casual employment," the work actually "contemplated" by her when she employed Hayden was completed within ten days, and at a cost for labor of less than one hundred dollars. In support of this contention she testified that the structure she was building for the occupancy of her brother and family was to be completed only as far as the exterior was concerned. No inside comforts or furnishings were to be provided, and no toilet was to be built on the premises; that as the work

progressed she changed her mind, and, in order to make the place more habitable as a dwelling, she went ahead and completed the structure. She relies upon evidence of an alleged understanding with the decedent, Hayden, that the house would be built in three or four days, and her own testimony as to what work she contemplated at the time. However that may be, at one point in her testimony Mrs. Dearborn testified that she employed Hayden "with the expectation that he would remain to finish—to go through with the building." It is quite clear that the death of Hayden in no way operated to cause any change in the plans for the building. It seems only reasonable to infer that the work actually contemplated by the petitioner, when she employed Hayden, was the erection of some kind of a dwelling-house, which would be habitable and at least fairly comfortable when occupied by her relatives. She may not have had very definite ideas on the subject as to the cost and duration of the work. Whatever her plans may have been, her testimony last quoted shows that it was undoubtedly within her contemplation that the decedent would remain to finish the work of erecting the building. That work, as has been shown, took more than ten days and the cost of the labor was in excess of one hundred dollars. In the judgment of the commission the petitioner did not successfully overcome the burden of proof imposed by the statute. It specifically found that the evidence before it was insufficient to show that the work contemplated was confined to exterior work and flooring, and did not include interior work and the toilet.

The respondents point out that, if it were true that the work contemplated by the petitioner, when she employed the decedent, was to be completed in four days, there would still be evidence to support the finding of the commission that the cost of the labor was in excess of one hundred dollars, and the employment was, therefore, not casual. The carpenters, and there were three of them, each received \$8.50 per day. At that rate the cost of their labor alone for the four days would amount to \$102.

[2] From this review of the proceedings it clearly appears that facts were not wanting before the commission to justify the finding that the total labor cost of the building upon which the decedent employee was engaged was in excess of one hundred dollars, and the time occupied by the



contemplated work more than ten days. Its conclusion, based thereon, that the employment was not casual is amply supported. The commission was, therefore, not without jurisdiction in the matter, and the award is affirmed.

Lennon, J., Wilbur, J., Richards, J., *pro tem.*, Shaw, C. J., Shurtleff, J., and Sloane, J., concurred.

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[L. A. No. 6832. In Bank.—December 20, 1921.]

In the Matter of the Estate of EVA VAN BUSKIRK  
CARRILLO, Deceased.

- [1] ESTATES OF DECEASED PERSONS—WILLS — INTERPRETATION — INTESTACY NOT FAVORED.—An interpretation of a will leaving a portion of an estate in a state of intestacy is not favored by the law.
- [2] ID.—DOUBTFUL WORDS AND PHRASES—INTENT—SURROUNDING CIRCUMSTANCES.—Doubtful words and phrases in a will should be so construed as to give effect, if reasonably possible, to the intent of the testatrix, and in ascertaining such intent, resort may be had to the circumstances under which the will was executed.
- [3] ID.—BEQUESTS OF "CASH" LEFT AT DEMISE — CONSTRUCTION OF WILL—NOTE AND MORTGAGE.—Where a testatrix, after disposing of numerous articles of personal property to her various relatives and making a devise and several bequests of personal effects to her daughter and to her brother, separately bequeathed to each of them "one-third of cash that is left after my demise," and at the time of the execution of the will a portion of her estate consisted of money due her from the estate of her deceased husband, which expected increment was still in the form of money due and payable at the time of her demise, and thereafter her administrator received the promissory note and a mortgage of the executors of her deceased husband's estate for the unpaid balance of such indebtedness, such note and mortgage were properly construed as "cash" within the meaning of such bequests.

APPEAL from a decree of final distribution of the Superior Court of Los Angeles County. Frederick W. Houser, Judge. Affirmed.

The facts are stated in the opinion of the court.

Thomas K. Case for Appellant.

Charles L. Evans and W. W. Butler for Respondents.

RICHARDS, J., *pro tem.*—This appeal is from a decree of final distribution of the residue of the property belonging to this estate. The only question presented upon this appeal is as to the meaning to be given to the word "cash" as used by the testatrix in her holographic will. Eva Van Buskirk Carrillo was the widow of one J. J. Carrillo, who had died, leaving a will by the terms of which she was given a one-eighth interest for life in the residue of his estate, consisting at the time his will was made of certain lands subject to mortgage. She was also given a legacy of \$5,000. During the course of probate of his estate she had applied for and received a family allowance, a considerable portion of which was not promptly paid, nor was her legacy delivered to her up to the time of the making of her holographic will. In the year 1918 Eva Van Buskirk Carrillo executed her holographic will wherein, with much detail, she proceeded to bequeath numerous articles of personal property, such as rings, brooches, bracelets, earrings, china, clothing, and other personal effects of which she was then possessed to her various relatives, giving to each specific articles by name. She also devised the only piece of real estate of which she was then the owner, her home, to her brother and her daughter, share and share alike. As to her said daughter, Maude M. Whitaker, the clause in her said will by which the latter was to receive certain specific articles of personalty, and was also to receive her above named interest in said real estate, contained the added words "1 third cash." The succeeding clause in said will by which her brother James L. Orr was also given considerable personal effects, together with a one-half interest in said real estate, contained the words "1 third of cash that is left after my demise." One other clause in said will may be noted as bearing on the question involved in this appeal. It reads as follows: "If I have the \$7000 coming to me I give to Mr. Peyton H. Moore for the legal work \$500.00 he is deserving of it, as I promised if he got my estate settled I would make him a present and please give this amount to him providing I have \$7000.00 left." At the time of the execution of this will the only actual

money which Mrs. Carrillo had on hand was the sum of \$95 in bank. There was then due her, however, the sum of \$1,450 upon account of her widow's allowance from her husband's estate, together with her one-eighth interest in the residue thereof, as well as her said unpaid legacy. Between the date of her said will and the date of her death in October, 1919, she effected a compromise of her claims against her said husband's estate by which it was agreed that she should be paid the sum of \$10,500 in full settlement. Of this sum she received the sum of \$1,000 during her lifetime, of which sum \$907.17 was on hand at the time of her death. After her death and while her estate was in course of probate her administrator with the will annexed received the additional sum of \$2,500 in money and a promissory note and mortgage for the sum of \$7,000 executed by the duly authorized executors of her husband's estate. Of the money thus received there were expended certain sums in the course of administration, so that there remained on hand in money the sum of \$1,612.98 when the estate was ready for distribution. There was also on hand the aforesaid note and mortgage for the sum of \$7,000. The petition for final distribution, which was filed by Maude M. Whitaker, the daughter of said decedent, set forth the foregoing two items as assets of the estate and prayed that they be distributed to her as the sole surviving heir of her mother. The court, however, disregarded this prayer and, treating these assets as "cash," distributed the same by its decree of distribution one-third each to the persons named in said will as entitled to "1 third of cash that is left after my demise." From said decree of distribution the said daughter and sole surviving heir of said decedent prosecutes this appeal.

It is the contention of the appellant that the word "cash" and the phrase "cash that is left after my demise" are to be construed as meaning the actual money on hand at the time of the death of the testatrix, to wit, the sum of \$907.17, and that it is this sum only that should have been divided among the three persons mentioned in the said will as entitled to "cash that is left after my demise." The balance of the money on hand at the date of distribution and the said note and mortgage the appellant claims herself to be entitled to as the unassigned residue of said estate. It is to be noted at the outset that this claim on the part of the appellant, if

acceded to, would compel the conclusion that the testatrix did not intend to dispose of her whole estate by her said will, but did intend to leave that portion thereof which the appellant now claims in a state of intestacy. [1] Such an interpretation is not favored by the law. (*Estate of O'Gorman*, 161 Cal. 654, [120 Pac. 33]; *Estate of Heberle*, 153 Cal. 275, [95 Pac. 41]; *Estate of Blake*, 157 Cal. 448, [108 Pac. 287]; Civ. Code, sec. 1326.) It is also to be noted as an aid to our reasoning as to the proper interpretation to be given to these words in this will that the testatrix began to write her said holographic will with the following words: "I, Eva Van Buskirk Carillo being in sound mind and body do hereby give to the following persons named herein for love and affection *money* and articles." It is also to be noted that no money is disposed of by the terms of this will unless the word "cash" as used therein is to be interpreted as the synonym of "money." It is significant at this point to take note of the fact that the maker of this will had expressly in mind the sum of \$7,000 which she was entitled to receive and which, according to her expression, was "coming to me" in cash from the estate of her deceased husband, and which she had an expectancy of receiving during her lifetime. Had this expectancy been realized then, according to the appellant's own interpretation of the meaning of this will, it would under its terms have been properly divided into the three equal shares among those entitled to "cash" bequests in said will. It must, therefore, have been so intended by the testatrix, if the appellant's own contention be taken to be sound. In this immediate connection also it is to be noted that this expected increment was still in the form of money due and payable at the time of her demise, and was only placed in the form of a note and mortgage by the act of her administrator after her death. It must, therefore, for the purpose of interpreting this will be treated as money in expectancy when the testatrix drew her will. Pursuing the foregoing chain of reasoning and treating the testatrix's use of the word "cash" as employed in her said will as intended to mean "money," we are led to the conclusion that the testatrix used the word "cash" in the broader meaning of "money," which has sometimes been given to it. The following cases show the sense in which the word "money" has been sometimes used in wills. In *Estate of Miller*, 48 Cal. 165, [22 Am. Rep.

422], the following words were used: "It is conceded by the appellant that the word 'money' in wills has been frequently construed by the courts, both in England and America, to include the personal estate of the testator. The following authorities would seem to place this point beyond all doubt: *Dawson v. Gaskoin*, 2 Keen, 14; *Boys v. Morgan*, 3 Mylne & C. 661; *Kendall v. Kendall*, 4 Russ. 360; *Chapman v. Reynolds*, 20 Beav. 221; *Levinson v. Lady Lennard*, 34 Beav. 490; *Morton v. Perry*, 1 Met. 446; *Cowling v. Cowling*, 26 Beav. 452; *Langdale v. Whitfield*, 4 Kay & J. 436; 2 Redfield on Wills, 2d ed., 111; 2 Williams on Executors, 1025; 2 Redfield on Wills, 437, note; Jarman on Wills, c. 24, and cases there cited."

In *Estate of Jacobs*, 140 Pa. St. 268, [23 Am. St. Rep. 230, 11 L. R. A. 767, 21 Atl. 218], the property of the testatrix, at the time her will was executed, consisted only of personal estate. She disposed of the residue of her estate as follows: "The remainder and residue of my money I give and bequeath to the Hospital of the Protestant Church of Philadelphia." The supreme court of Pennsylvania, in construing this clause in her will, said: "It appears very plain to us that this testatrix used the word 'money' in the popular sense as the equivalent of property and that she intended all of her estate to pass by the residuary clause. She knew of what her estate consisted when she made her will. She knew it would satisfy all pecuniary legacies and leave a small residue." In 27 Cyc., at page 120, the commentator in defining the word "money" as used in wills says: "In its widest and popular sense it is frequently employed as synonymous with property, estate; including, when the context so indicated, any kind of property, even land. Sometimes it includes the whole personal estate and often the proceeds of realty. The meaning of the word, when used in a will, depends upon the context, and may be affected by the conditions of the testator's property and the surrounding circumstances."

[2] We are pointed by these authorities to the final test to be applied to the determination and meaning of doubtful words and phrases in the will of a decedent. Such words and phrases should be so construed as to give effect, if reasonably possible, to the intent of the testatrix. (*Estate of Heywood*, 148 Cal. 184, [82 Pac. 755]; *Estate of Reith*, 144 Cal.

314, [77 Pac. 942]; *Estate of Koch*, 8 Cal. App. 90, [96 Pac. 100].) In ascertaining this intent resort may be had to the circumstances under which the instrument was executed. (*Estate of Spreckels*, 162 Cal. 559, [123 Pac. 371].) One of the most significant circumstances attending the execution of a will is to be found in the knowledge which the testatrix has of what her estate consists. In the case at bar this knowledge on the part of the testatrix was most exact and detailed. She knew she had certain items of jewelry and of household and personal effects, which she distinctly identifies and distributes to the recipients of her bequests by name. She knew she had certain real estate and to whom she wished to devise it. She knew she had the sum of \$7,000 in the form of a money obligation presently payable and which she expected to receive before she died. She knew she had no other estate. By use of the words in her will "what is left after my demise" she clearly intended to refer to the residue of her estate and she, therefore, as clearly did not intend to leave any portion of her estate undisposed of. [3] These considerations lead to but one unavoidable conclusion, which is that by the use of the word "cash" in her will, with its context, the testatrix intended to refer to and distribute the money to be received by her from her deceased husband's estate. This construction the trial court adopted in its decree of distribution in this estate, and we are satisfied that it committed no error in so doing.

The judgment is affirmed.

Shaw, C. J., Wilbur, J., Waste, J., Lennon, J., Shurtleff, J., and Sloane, J., concurred.

[L. A. No. 6925. In Bank.—December 20, 1921.]

In the Matter of the Estate of JOHN NICKSON, Deceased.  
MINNIE L. CLAYTON, Appellant, v. H. L. PERRY,  
Executor, etc., et al., Respondents.

- [1] **COMMUNITY PROPERTY—REBUTTAL OF PRESUMPTION—DEGREE OF PROOF.**—While the presumption of community property created by section 164 of the Civil Code can only be overcome by clear and satisfactory proof, it is incumbent on the party seeking to rebut the presumption to do no more than to produce such legal evidence as, under all the circumstances of the particular case, would ordinarily produce conviction to an unprejudiced mind.
- [2] **ID.—DETERMINATION OF SUFFICIENCY OF EVIDENCE—QUESTION FOR TRIAL COURT.**—Whether or not the evidence offered to overcome the presumption of community property is clear and convincing is a question for the trial court, and its determination upon conflicting evidence is not open to review on appeal.
- [3] **ID.—SEPARATE PROPERTY—SUFFICIENCY OF EVIDENCE.**—In this proceeding on final distribution, involving the character of the property of an estate, the evidence is held sufficient to overcome the presumption of community property created by section 164 of the Civil Code and to sustain the decree that the estate was the separate property of the deceased.

APPEAL from a decree of final distribution of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. C. Shelton for Appellant.

R. S. Parker for Respondents.

RICHARDS, J., *pro tem.*—This appeal is from a decree of final distribution wherein the trial court, over the objection of the appellant, distributed the whole of the estate of the decedent as having been his separate property during his

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1. What is community property, note, 126 Am. St. Rep. 99.

Whether profits accruing during marriage in connection with property belonging to separate estate of either spouse is community property, note, 31 L. R. A. (N. S.) 1092.



lifetime. Decedent died in Los Angeles County, California, where he had lived since his removal to California from the state of Iowa in or about the year 1894. Prior to his residence in Iowa he had lived in Wisconsin for a number of years where, in the year 1878, he had married Naomi Nickson, who thereafter lived with him as his wife in Wisconsin, in Iowa, and in California up to the time of his death. Both parties to this marriage had been married before and each had children of such prior marriage, Naomi having two daughters, Lillie Watson and Mrs. Minnie L. Clayton, the latter being the contestant and appellant herein. John Nickson had by his prior marriage five sons, J. W. Nickson, T. J. Nickson, C. D. Nickson, Samuel S. Nickson, and Harry S. Nickson. There were no children of this second marriage. Some time prior to his death John Nickson made his last will in which he declared that the whole of his estate was his separate property, which he therein proceeded to dispose of by making certain specific legacies to certain of his said children and stepchildren. He then devised all of the remainder of his property to his wife, Naomi Nickson, for and during her natural life, with the right to the total net income thereof, and also with right that in the event of such net income not being sufficient for her reasonable care and support, she might use so much of the principal estate as might be necessary for such purpose. Upon her death the remainder of said estate was to be divided among four of his said sons, share and share alike. John Nickson died on December 15, 1917. His said will was offered for probate shortly thereafter, and having been duly admitted to probate the administration of his estate proceeded until the same was ready for distribution in September, 1919, when the executor filed his final account and petition for distribution of said estate, wherein he averred that "the whole of the said estate is separate property of said deceased" and prayed for its distribution according to the terms of the last will of the decedent. In the meantime his widow, Naomi Nickson, had been declared incompetent and her daughter, Mrs. Minnie L. Clayton, had been appointed her guardian; and the latter, on October 8, 1919, appeared on behalf of her said mother and objected to the distribution of said estate as prayed for by said executor, alleging that the whole of the decedent's property and estate was community property of himself and his

said wife, Naomi Nickson, and praying that the same should be distributed one-half to said Naomi Nickson, as her share of the community property, and the balance thereof according to the terms of said last will of the decedent. The contest thus created came on for hearing before the court and a large amount of testimony was offered thereon. At the conclusion of such hearing the court made its findings in words and effect "that all of said property and every part thereof was at his decease the separate property of said John Nickson, deceased, and that no part thereof was or is community property of said John Nickson and Naomi Nickson." The court accordingly by its decree distributed the whole of said property and estate according to the terms of the last will of said deceased. From this decree the appellant, Minnie L. Clayton, prosecutes this appeal.

It is an undisputed fact upon this appeal that all of the property which John Nickson undertook to dispose of by his last will and testament and of which he died seised he had acquired by purchase and increment since his arrival in California, and hence during his marriage with his said wife Naomi. This being so, the appellant invokes the presumption created by section 164 of the Civil Code, that all of said property was community property, and having done so insists that this presumption is one which can only be overcome by "clear and satisfactory proof," or, as it is sometimes stated in the cases, by "clear and convincing evidence" that such property was acquired by separate funds and that the burden of producing such proof lies upon the party claiming the property as separate; citing in that behalf *Smith v. Smith*, 12 Cal. 216, [76 Am. Dec. 533]; *Dimmick v. Dimmick*, 95 Cal. 323, [30 Pac. 547]. There can be no quarrel with a rule as well and old established as the rule above stated and supported by said authorities; but we are still required to determine the scope and meaning of the terms "clear and satisfactory proof" and "clear and convincing evidence" as employed in these cases. In arriving at this determination we are directly aided by the decision of this court in the case of *Freese v. Hibernia Sav. etc. Society*, 139 Cal. 392, [73 Pac. 172], in which the precise question was discussed and decided as to the force and effect to be given to both of the foregoing phrases: "Speaking of expressions of this character," says the court, "some of which

were stronger in terms than any used by this court, Ballinger in his work on Community Property, says (section 167): 'It is not believed, however, that these terms should be considered as going to the length that their general meaning might import. Certainly it is not required that the proof to destroy this presumption should be any more than sufficient to satisfy the mind of court or jury that its weight is enough to cause a reasonable person, under all the circumstances, to believe in its sufficiency, in order to counterbalance the naked presumption that the property was acquired with the funds of the community. The property is merely considered as the property of the community until the contrary is shown by legal proof, and legal proof would seem to be a preponderance of the testimony under all the facts and circumstances of the particular case.' . . . [1] We are of the opinion that it is incumbent on the party seeking to overcome the presumption of community property to do no more than to produce such legal evidence as, under all the circumstances of the particular case, would ordinarily produce conviction to an unprejudiced mind, and that in the face of such evidence the naked presumption, unsupported by any testimony, must fall." In the later case of *Couts v. Winston*, 153 Cal. 686, [96 Pac. 357], this court says: [2] "Whether or not the evidence offered . . . is clear and convincing is a question for the trial court. . . . In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court." In the case of *Estate of Pepper*, 158 Cal. 619, [31 L. R. A. (N. S.) 1092, 112 Pac. 62], the language of both of above cases was quoted and approved. In the light of these cases we approach the evidence in the instant case, which may be fairly summarized as follows: John Nickson, prior to the time of his marriage with his second wife, Naomi, in the year 1878, had been the owner of a farm in Wisconsin and also of some mining interests therein, which, together with his personal property consisting of money, cattle, and farming equipment, was variously estimated by several witnesses to be of the value of from ten thousand dollars to fourteen thousand dollars. About three years before his marriage with Naomi, and while his first wife was still living, he began to remove his property interests and effects to the state of Iowa, where he acquired a

farm of about 160 acres, which he stocked with his cattle and farming machinery brought from Wisconsin. These possessions were his when he returned to Wisconsin to marry Naomi, and he was then sufficiently well to do to be loaning money in the neighborhood of his Iowa home. From time to time during the twenty years he lived in Iowa after his marriage he added to his farm holdings until they amounted to about 540 acres in 1894, when he determined to remove to California, which he did in the month of December of that year. During the sixteen years of his married life in Iowa he and his wife Naomi were both hard-working people on the farm, his wife performing the usual work of a farmer's wife thereon and both deriving their living from its proceeds. Whatever increment there was in the acreage or equipment of his farm during these years came chiefly from its annual product and the profits arising therefrom. When the resolution was reached to remove to California John Nickson offered his realty holdings in Iowa for sale and held a public auction of his personal property, and derived from the sale of both the sum of about sixteen thousand dollars, which he transferred to this state and began investing here. Some question has been raised as to the rights of the wife in this property prior to its removal to California and under the laws of the state of Iowa, but we think this question is fairly set at rest by the decisions of that state holding that the dower interest of the wife under the statutes of Iowa then in force was a mere expectancy, dependent on survivorship to become a vested right. (*Mock v. Watson*, 41 Iowa, 241; *Dougherty v. Dougherty*, 69 Iowa, 677, [29 N. W. 778]; *Purcell v. Lang*, 97 Iowa, 610, [66 N. W. 887]; *Beach v. Beach*, 160 Iowa, 346, [Ann. Cas. 1915D, 216, 46 L. R. A. (N. S.) 98, 141 N. W. 921].) Within a short time after his arrival in California John Nickson began investing in real estate. He first purchased five acres of land planted to citrus fruit at Chula Vista, California, upon which he and his wife lived and where for a brief time they ran a boarding-house, but whether at a profit or not does not appear. He also invested in a prune orchard near Tulare, California, where he and his wife worked for two summers. Some six years later he bought another tract of land in Whittier for fourteen hundred dollars on the installment plan, for which he finally paid. He also from time to time pur-

chased other property, so that at the time of his death he was the owner of real estate in the counties of Orange, Riverside, and Los Angeles of the appraised value of \$28,472.46. During these years of residence in California and of the acquisition of these properties therein John Nickson was an elderly and aging man, with no trade, profession, or business, but worked hard upon the properties he from time to time owned, and showing some considerable degree of shrewdness in making his investments. During these years also his wife Naomi lived and worked with him upon whichever of their properties they resided, but it nowhere appears that any income which could reasonably be credited to these joint labors would have more than sufficed for their mutual support. In the year 1915 John Nickson executed his will which was the subject of probate in this proceeding and in his said will stated that all of his property devised thereby was his separate property and estate. About two years thereafter, and in December, 1917, he undertook to establish the title to his various pieces of real estate in the county of Los Angeles under the Torrens Land Act. In the petition filed by him in that proceeding he alleged himself to be "the owner of an estate in fee simple as his separate property" of the real estate described therein. It was also stated that "Naomi Nickson joins herein as applicant," and the affidavit appended to said petition was signed by both John and Naomi Nickson. The decree followed the language of the petition in finding that all of the allegations thereof were true and in decreeing that John Nickson "is the owner of an estate in fee simple as his separate property in the premises described in said petition." We do not undertake to consider or decide herein the validity of the foregoing proceeding or the effect of the decree therein as being *res adjudicata* between the parties hereto, since we think that our conclusions herein may be put upon other grounds.

In addition to the other facts above set forth, there was some further evidence produced tending to show that Naomi Nickson had at one time stated that she herself was the owner of certain separate property at the time of her marriage to John Nickson, which had gone, or was to go, to her daughters, whereas the property belonging to John was to go to his sons exclusively; and that upon various other occasions after the making of his said will she had

stated to various parties that she was satisfied with its terms and with her husband's treatment of her therein and that all of the property was his. On the other hand, there was some evidence that at the time the proceeding under the Torrens Land Act was taken and the foregoing statements were made by her, Naomi Nickson was over eighty years of age and was in a feeble condition of both mind and body. [3] In regard to these matters the evidence is somewhat conflicting, but with respect to the main body of the evidence touching the property, ownership, investments, and accretions of John Nickson before and after his marriage to Naomi Nickson there is practically no conflict in this evidence, and we are of the opinion that it is ample to produce that degree of proof which would suffice to overcome the presumption that the properties acquired by John Nickson after his said marriage were community property, and also to sustain the finding and decree of the probate court that the said property and the whole thereof was his separate property.

The appellant chiefly relies for a reversal upon the case of *Estate of Hill*, 167 Cal. 59, [138 Pac. 690], but an examination of that case shows that the appellant can derive no comfort therefrom, since upon a state of facts in many respects similar to those in the instant case the trial court decided that certain of the property involved therein was the separate property of the husband, which conclusion this court approved upon appeal.

Judgment affirmed.

Shaw, C. J., Waste, J., Lennon, J., Shurtleff, J., and Sloane, J., concurred.

[S. F. No. 9705. In Bank.—December 20, 1921.]

**CALIFORNIA PACKING CORPORATION (a Corporation), Appellant, v. H. LARSEN, Respondent.**

- [1] **CONTRACT—MUTUAL MISTAKE—RELIEF—PLEADING AND EVIDENCE.**—A defendant may plead and prove a mutual mistake in the making of a contract which is sought to be enforced against him and be entitled to relief therefrom without asking for a reformation of the contract or having the same reformed.
- [2] **ID.—SUFFICIENCY OF EVIDENCE—QUESTION FOR TRIAL COURT.**—The sufficiency of the evidence to justify the reformation of a contract on the ground of mistake is a question for the trial court.
- [3] **ID.—WRITTEN CONTRACT FOR SALE OF FRUIT CROP—MUTUAL MISTAKE—AMOUNT SOLD—SUFFICIENCY OF EVIDENCE.**—In this action for damages for the alleged breach of a written contract for the sale and delivery of one-half of the fruit crop, the finding that there was a mutual mistake in the minds of the parties as to the terms and scope of the contract is held sufficiently supported by the evidence.

**APPEAL** from a judgment of the Superior Court of Fresno County. M. F. McCormick, Judge. Affirmed.

The facts are stated in the opinion of the court.

Short, Lindsay & Woolley and Pillsbury, Madison & Sutro for Appellant.

Harris & Hayhurst and Julius Hansen for Respondent.

**THE COURT.**—This action was brought by the plaintiff for the recovery of the sum of \$387.50, damages alleged to have resulted from the failure and refusal of the defendant to deliver to plaintiff one-half of a crop of apricots, amounting in all approximately to four tons, grown upon the premises owned by the defendant.

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1. Mutual mistake as ground for reformation of written instruments, notes, 80 *Am. St. Rep.* 621; 117 *Am. St. Rep.* 227; 3 *Ann. Cas.* 444.

2. Sufficiency of evidence to warrant reformation of instrument on ground of mutual mistake, note, 19 *Ann. Cas.* 343.



The plaintiff alleged that the said defendant entered into a written contract with it for the sale and delivery of the whole of said fruit, but only delivered one-half thereof under said contract and failed and refused to deliver the other half thereof, to its damage in the sum stated.

The written contract between the parties relating to the sale and delivery of said fruit is attached to and made a part of the complaint. The defendant in his answer denied the execution of said contract in the form and effect averred by the plaintiff and further affirmatively set forth substantially the following facts: That as the owner of the premises upon which the apricot crop in question was grown he had, some time before the contract for the sale of said fruit was made between the plaintiff and himself, entered into a lease of said premises with one Poulson, who went into possession thereof; that by the terms of said lease each of the parties thereto was to receive one-half of the crops grown on said premises, and each was to have the right to sell his one-half thereof; that on the date on which the contract between himself and the plaintiff was signed one Pilegard, a purchasing agent of the plaintiff, came to said premises and requested the defendant to sell to plaintiff the crop of apricots growing thereon; that thereupon the defendant fully explained to the said agent of the plaintiff that the said premises were leased to the said Poulson, and that he, the defendant, had only the right to sell one-half of the said apricot crop and would not agree to sell any more than one-half thereof; that thereupon and with that understanding the defendant signed the memorandum of agreement which the said agent of the plaintiff then prepared, it being fully understood and agreed between himself and the said agent of the plaintiff that the "crops" mentioned in said agreement referred only to the portion of the crop which the defendant could sell, viz., the one-half thereof; that by mistake on the part of the said Pilegard he failed to write into said agreement that the defendant was selling only one-half of the crop, and that at said time said Pilegard fully knew and understood that the defendant intended to sell only one-half thereof. The defendant further averred that he had fully delivered to plaintiff the one-half of said crop so sold and agreed to be delivered by him and has fully performed the terms of his said contract to be by him performed. The defendant prayed that

plaintiff have nothing by its action and that he have judgment for his costs. Upon the trial of the cause the defendant testified fully in support of the foregoing affirmative averments of his answer and was supported therein by other testimony and evidence.

Upon the submission of the case the trial court found that all the foregoing averments of the defendant's answer were true, and as a conclusion of law therefrom found that the plaintiff should take nothing by its action and that the defendant should have judgment in his favor and for his costs. From the judgment entered in conformity with these findings the plaintiff prosecutes this appeal.

It is conceded by the appellant upon the threshold of its argument herein that there is but one issue upon this appeal, and that is as to "whether or not the evidence sustains the findings of the court that the parties made a mutual mistake in executing the agreement sued on." This concession takes out of review all questions as to the sufficiency of the averments of the defendant's answer as to a mutual mistake of fact attending the execution of the contract in question, and it must, therefore, be taken as conceded that, had the defendant asked for affirmative relief in the way of the reformation of said contract, he would, if the proof had supported his averments, have been entitled to such relief.

[1] It was not necessary for the defendant to ask for such relief, since this court has held that a defendant may plead and prove a mutual mistake in the making of a contract which is sought to be enforced against him, and be entitled to relief therefrom without asking for a reformation of the contract or having the same reformed. (*Newman v. Lassing*, 141 Cal. 174, [74 Pac. 761]; *Field v. Austin*, 131 Cal. 379, [63 Pac. 692]; *Toby v. Oregon Pacific Ry.*, 98 Cal. 490, [33 Pac. 550]; *Pomeroy's Equity Jurisprudence*, 4th ed., sec. 868.) The case of *Bradbury v. Higginson*, 167 Cal. 553, [140 Pac. 254], cited by the appellant, is not in conflict with the foregoing cases, since in that case a rescission was affirmatively pleaded and sought, and the court was dealing with the sufficiency of the averments and proofs to justify a rescission of the contract, and was not dealing with the question of defensive relief where a right of reformation was sufficiently pleaded and shown.

[2] We are thus brought to the second question presented by the appellant herein, which is as to the sufficiency of the evidence educed by the defendant to establish a mutual mistake in the execution of the contract for the sale of the fruit in question. The appellant insists that the evidence which will be sufficient to justify the reformation of a contract upon the ground of mistake must be clear and convincing. Assuming that the rule for which the appellant contends would have application to the attitude of the trial court toward cases of this character, we are satisfied that in this case there was clear evidence of a mistake, and whether or not it was convincing was entirely a question for the trial court. (*Wadleigh v. Phelps*, 149 Cal. 627, 637, [87 Pac. 93]; *Mahoney v. Bostwick*, 96 Cal. 53, [31 Am. St. Rep. 175, 30 Pac. 1020]; *De Kahn v. Chase*, 177 Cal. 281, [170 Pac. 608].)

The evidence which the defendant presented to the trial court sufficiently showed the following facts in this case. The defendant, as the owner of the premises upon which the apricot crop in question was grown, had leased the same to one Poulson under a cropping lease which gave the latter possession of the premises with the right to one-half of the fruit grown thereon, each of the parties to said lease having the right to sell his one-half of said fruit. On the day upon which the contract between plaintiff and the defendant was entered into, the plaintiff's agent approached the defendant with an offer to buy said fruit. The defendant informed him that he had only the right to sell one-half of the apricot crop. The agent understood at the time that Poulson was the defendant's lessee under a cropping contract entitling him to one-half of the fruit crop grown on the premises. He went away for the stated purpose of securing the consent of his principal to purchase the defendant's fruit, and a few hours thereafter returned, bringing with him the usual printed form of contract for the buying of fruit crops, which he proceeded to fill out with the few written words requisite to give it application to the defendant's fruit, and passed it to the defendant to sign. The defendant did not read the contract closely, for the reason that he understood it was to have application to his portion of the fruit crop only, and also because the plaintiff's agent had hurriedly prepared and proffered said contract to him for his signature, and then hastened away to secure contracts

from other fruit-growers, taking the contract with him and not leaving with the defendant any copy thereof. It is urged by the appellant that the fact that the defendant did not read his contract, as it was his legal duty to do, should militate strongly against the right of the defendant to a reformation thereof. But whether or not it does so must depend upon the circumstances of the particular case. This subject was fully discussed by this court in *Los Angeles etc. Co. v. New Liverpool Salt Co.*, 150 Cal. 21, [87 Pac. 1029], where, after a full review of the cases, this court said: "It has been frequently decided that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly." The defendant never saw the contract again until after he had delivered to plaintiff his one-half of the apricot crop, which the latter received and paid for, and thereafter for the first time demanded that he deliver the whole of the crop. The defendant is supported in his testimony as to the foregoing facts by other witnesses called on his behalf, while the evidence of the plaintiff's agent, Pilegard, called on its behalf, tends to support the defendant's story in so far as it shows that he knew at the time the contract was drawn that the defendant was not entitled to sell but one-half of the crop. In so far as the testimony of the defendant and his witnesses is in conflict with the testimony of the plaintiff's agent, Pilegard, it was for the trial court to determine which was to be believed, and its conclusion thereon is not the subject of review here.

[3] We think the finding of the trial court to the effect that there was a mutual mistake in the minds of the parties as to the terms and scope of the written contract for the sale of this fruit was sufficiently supported by the evidence, and, since this is the only question in the case, the judgment is affirmed.

Richards, J., *pro tem.*, Shaw, C. J., Waste, J., Lennon, J., Wilbur, J., Shurtleff, J., and Sloane, J., concurred.

[S. F. No. 9839. In Bank.—December 21, 1921.]

**EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED (a Corporation), et al., Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.**

- [1] **WORKMEN'S COMPENSATION ACT—POWER OF LEGISLATURE—CONSTITUTIONAL LAW.**—The legislature has no power under section 21 of article XX of the constitution to create and enforce a liability on the part of any person not an employer to compensate persons who do not sustain to him the relation of employee, or to create courts or commissions having judicial power for the settlement of disputes concerning such liability between persons who do not sustain the relation of employer and employee to each other.
- [2] **ID.—INJURY TO MEMBER OF PARTNERSHIP—LACK OF JURISDICTION OF COMMISSION.**—The Industrial Accident Commission has no jurisdiction to entertain an application or to make an award of compensation to a member of a partnership, where such member was not an employee of the firm at the time of his injury, but an equal member performing without wages his part of the work and business and receiving and to receive his only reward therefor out of an equal division of the profits.
- [3] **ID.—INSURANCE CARRIER—LISTING OF PARTNER AS EMPLOYEE—ESSENCE OF ESTOPPEL.**—An insurance carrier of a partnership is not estopped from claiming that a member of the partnership was not an employee, by reason of the fact that such partner was expressly listed in the policy as an employee, since jurisdiction cannot be conferred upon a tribunal of limited powers either by the direct agreement of the parties or by an estoppel growing out of such an agreement.

**PROCEEDING** in Certiorari to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

R. P. Wisecarver and Redman & Alexander for Petitioners.

Adolphus E. Graupner and Courtney L. Moore for Respondents.

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2. Members of partnership as employees within meaning of Workmen's Compensation Acts, note, L. R. A. 1918F, 204.

RICHARDS, J., *pro tem.*—This proceeding was instituted by the petitioners herein to review an award of the Industrial Accident Commission granting compensation to W. L. Williams, one of the respondents herein. There is no dispute as to the facts upon which this proceeding is predicated. W. L. Williams was a partner in the firm of Green & Williams, copartners, engaged in the rock-crushing business and employing several men. The duties of Williams as a member of said firm were those of working with the men in the gravel-pit, while the duties of Green, the other member of the copartnership, were those of attending to the selling and collecting business of the firm. Each was an equal partner, neither receiving wages, but deriving his benefits from the association solely out of the profits of the business. The petitioner herein was the insurance carrier of the firm under the terms of a policy issued by it, which policy, as to most of its provisions, was in the usual printed form, apparently intended for general use throughout the United States where workmen's compensation laws existed, with addenda attached thereto referring particularly to the provisions of the California law upon the subject. In this policy of insurance there was inserted the following clause:

“Payroll for Comp. to include drivers and drivers' helpers, also chauffeurs and chauffeurs' helpers.

“Including William L. Williams at an amount not exceeding \$1,666 per annum. All others excluded.”

W. L. Williams was injured while at work in the gravel-pit during the life of this policy and made application to the Industrial Accident Commission for an award, naming the firm of which he was a member and its insurance carrier as the respondents in said application. An answer was filed by the said respondents, denying the jurisdiction of the commission over said proceeding, and also denying that the applicant was in the employ of said firm, and alleging that upon the date of his injury the said applicant was not earning more than the minimum amount upon which compensation is based under the Workmen's Compensation Act. Upon the hearing before the commission it made an award to the applicant of \$20.83 a week for 240 weeks, and \$12.82 a week for the remainder of his life, together with the sum of \$708.22 accrued from the date of his injury to the date of said award. The award states “that the foregoing weekly

benefit is based upon wages exceeding the maximum at which compensation shall be computed." The insurance carrier applied for a rehearing before the commission, which was denied, whereupon it instituted this proceeding, seeking the annulment of the foregoing award.

The petitioner's first contention is that W. L. Williams was not an employee of the firm of Green & Williams and hence the Industrial Accident Commission could have no jurisdiction over his case. It must be concluded that as to the facts of the case, the undisputed evidence showed that W. L. Williams was not an employee of the copartnership of Green & Williams of which he was an equal member, performing without wages his part of the work and business of said firm, and receiving and to receive his only reward therefor out of an equal division of the profits thereof. There had been no profits earned by said copartnership up to the date of the applicant's injury. While he had withdrawn some small amounts from the firm these were, according to his own testimony, in the nature of loans, some portion of which he had repaid from other resources. Section 21 of article XX of the state constitution, as it read prior to 1918, provided: "The legislature may by appropriate legislation create and enforce a liability on the part of all employers as to compensate their employees for any injury incurred by the said employees in the course of their employment, irrespective of the fault of either party. The legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, or by an industrial accident board, by the courts, or by either, any, or all of these agencies, anything in this constitution to the contrary notwithstanding."

[1] It has been held by this court in several recent cases that the legislature had no power under this clause of the constitution to create and enforce a liability on the part of any person not an employer to compensate persons who do not sustain to him the relation of employee, and that the legislature under said section had no power to create courts or commissions having judicial power for the settlement of disputes concerning such liability between persons who did not sustain the relation of employer and employee to each other. (*Carstens v. Pillsbury*, 172 Cal. 572, [158 Pac. 218]; *Pacific G. & E. Co. v. Industrial Acc. Com.*, 180 Cal. 497,



[181 Pac. 788].) Each of these cases had reference to liabilities arising out of and during a partnership relation and in each of which it was decided that the provisions of the Workmen's Compensation Act wherein it was attempted to invest the Industrial Accident Commission with jurisdiction to hear and determine such cases were unconstitutional and void. In the year 1918 the foregoing section of the constitution was amended so as to broaden the powers of the legislature "to create and enforce a complete system of workmen's compensation by appropriate legislation." Whatever the effect of this amendment to the constitution may be in other respects, its primary object remains that of dealing, and of authorizing the legislature to deal, with the subject of workmen's compensation. In that respect it purports to be no broader in its scope than the section of the constitution above quoted and which it replaced. This being so, the above-cited decisions of this court defining the powers of the legislature under said former clause in the constitution still remain as to the particular point at issue here in full force and effect. [2] The respondent herein concedes the force of these decisions, but undertakes to avoid their effect by showing that in the policy of insurance issued to the firm of Green & Williams, said W. L. Williams was expressly mentioned and listed among the employees of said firm, and it is the respondent's contention that the name of W. L. Williams having been thus inserted in said policy among the employees of the firm, even though he was not in fact such employee, and that said insurance carrier having received benefits in the way of added premium by virtue of the insertion of the name of said Williams in said policy as such an employee, were sufficient to give the Industrial Accident Commission jurisdiction to determine the fact as to whether said Williams was or was not an employee of his own firm. This contention is based upon the showing that the Workmen's Compensation Act embraces certain sections which provide that working members of partnerships receiving wages, irrespective of profit from said partnership, shall be deemed employees thereof, and which also undertake to give the commission jurisdiction to determine controversies arising out of insurance policies issued to self-employing persons. (Workmen's Compensation Act, 1917, secs. 8b, 57b.) Even if it were to be conceded that such a stipulation between the in-

sured and the insurance carrier could suffice to confer jurisdiction upon the Industrial Accident Commission to hear and determine the question as to whether the person named as an employee therein is or is not such an employee as would be entitled to the benefits of the act, it would avail the applicant in this proceeding nothing, since the undisputed evidence shows that he was not in fact an employee of the partnership of which he was a member. His own testimony before the commission is conclusive upon this subject and brings the case squarely within the above authorities so as to compel an annulment of this award.

[3] The respondent herein, however, urges that the insurance carrier by the fact of having issued this policy and received the consideration therefor in the way of premium is estopped thereby to claim that W. L. Williams is not an employee of the insured. In support of this contention the respondent cites a number of cases from other jurisdictions, all of which, with one exception, are cases of agreement between individuals and estoppels arising therefrom in no way affecting the question of the jurisdiction of tribunals to hear and determine such controversies. On the other hand, it has been held in this state that a surety company is not estopped to deny liability upon a void obligation by reason of the fact that it has executed the same and received the benefits thereof. (*Loop L. Co. v. Van Loben Sels et al.*, 173 Cal. 228, [159 Pac. 600]; *Shaughnessy v. American Surety Co.*, 138 Cal. 543, [69 Pac. 250, 71 Pac. 701]; *Coburn v. Townsend*, 103 Cal. 233, [37 Pac. 202].) The case of *Kennedy v. Kennedy Mfg. Co.*, 177 App. Div. 56, [163 N. Y. Supp. 944], is the only case cited by petitioner bearing upon the question at issue here. That was a case arising under the Workmen's Compensation Act of New York, and the court held that the insurer in that case was estopped to deny that the applicant was an employee of the insured corporation when he had been listed as such employee in the insurance policy. This ruling, however, was not necessary to the decision of that case, since it clearly appeared that irrespective of the terms of the policy the applicant was, upon the facts, an employee of the corporation. That case is, therefore, not authority for the respondent's contention in the instant case. Upon principle it must be held that jurisdiction of the subject matter of a controversy cannot be conferred upon a tribunal of

limited powers either by the direct agreement of the parties or by an estoppel growing out of such agreement. (15 Corpus Juris, p. 844, sec. 164; *Lindsay-Strathmore Irr. Dist. v. Superior Court*, 182 Cal. 334, [187 Pac. 1056].) Upon the facts of this case the applicant for this award was not an employee of the copartnership of which he was a member at the time of his injury. The Industrial Accident Commission had, therefore, no jurisdiction to entertain his application or to make the award. Whether or not W. L. Williams would have a right of recovery in the ordinary courts of law upon any obligation on the part of the insurer arising out of the terms of this policy and of his injuries is a matter which we are not called upon to determine in this proceeding.

The award is annulled.

Wilbur, J., Waste, J., Lennon, J., Shaw, C. J., and Shurtleff, J., concurred.

Rehearing denied.

All the Justices concurred, except Sloane, J., who did not vote.

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[S. F. No. 9906. In Bank.—December 22, 1921.]

IRENE MOELING WEEKS, Petitioner, v. SUPERIOR COURT, etc., et al., Respondents.

- [1] DIVORCE—CONTEMPT—RIGHT TO FINAL DECREE.—A party to an action for divorce who has willfully disobeyed a lawful order of the court relating to the custody of the minor child of the marriage is not entitled to have the final decree entered until she has purged herself of the contempt.
- [2] ID.—CONSTRUCTION OF CODE.—Section 132 of the Civil Code, which provides that when one year has expired after the entry of the interlocutory decree the court, on motion of either party, may enter the final judgment granting the divorce, does not mean that a party may have a final decree entered when to do so would be a flagrant abuse of the principles of equity and of the due adminis-

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1. Right to enter final decree of divorce after time fixed by interlocutory decree expires, note, 1 A. L. R. 1591.

tration of justice, since it is within the contemplation of the section that facts arising subsequently to the granting of the interlocutory judgment should have their influence in determining the right to a final decree.

- [3] **CONTEMPT—STATUS OF PARTY.**—A party to an action cannot with right or reason ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to its legal orders and processes.

**APPLICATION** for a Writ of Mandamus to compel the granting of a final decree of divorce. Denied.

The facts are stated in the opinion of the court.

Max J. Kuhl and C. F. Eldridge for Petitioner.

T. P. Wittschen and G. E. Jackson for Respondent.

**WASTE, J.**—The petitioner seeks a writ of mandate to compel the respondent to grant her a final decree of divorce. Her application here is based upon the refusal of the superior court to act, for the reason that the petitioner, as a party to the divorce action, has willfully disobeyed the lawful order of the court relating to the custody of a child of the marriage, and is, therefore, in contempt of court.

The petitioner is the defendant in an action for divorce brought against her by her husband on the ground of extreme cruelty. When the action came on for trial she was represented in court by counsel, and she and the minor child of the marriage were in the state and within the jurisdiction of the superior court. By the terms of the interlocutory decree the court determined that the husband was entitled to a divorce, and awarded him the custody and control of the minor. On the day of the trial, and after the decree was granted, the petitioner, without the consent or permission of the court or of the plaintiff in the action, removed the minor from the state, where she has kept the child ever since. When one year expired after the entry of the interlocutory judgment, the petitioner, without coming into the state, applied to the respondent, through an attorney, for the entry of a final judgment granting the divorce. Her application was opposed by the plaintiff in the action on the facts stated, and upon the ground that petitioner is in contempt of court in keeping the minor outside the jurisdiction of the superior

court to prevent him from gaining possession of the child in accordance with the court's decree. Petitioner made no attempt to controvert these facts or the allegation as to her motive.

[1] We think the respondent was right in refusing to enter the final decree of divorce. [2] Section 132 of the Civil Code provides that when one year has expired after the entry of the interlocutory decree the court, on motion of either party, or upon its own motion, may enter the final judgment granting the divorce. But that does not mean that a party to the action may have a final decree entered when to do so would be a flagrant abuse of the principles of equity and of the due administration of justice. It is within contemplation of the section that facts arising subsequently to the granting of the interlocutory judgment should have their influence in determining the right to a final decree. (*Olson v. Superior Court*, 175 Cal. 250, 252, [1 A. L. R. 1589, 165 Pac. 706].) When one becomes a voluntary actor before a court and seeks the court's aid it is manifestly just and proper that in invoking that aid he should submit himself to all legitimate orders and processes. [3] No party to an action can, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to its legal orders and processes. (*O'Neill v. Thomas Day Co.*, 152 Cal. 357, 362, [14 Ann. Cas. 970, 92 Pac. 856].) "No rule of law seems more widely prevalent or better established than that a court whose authority has been put to naught will extend no favors or privileges to the party in contempt until he has acknowledged its authority by purging the offense." (4 Ency. Pl. & Pr. 805; 13 Corpus Juris, 91; *Winter v. Superior Court*, 70 Cal. 295, [11 Pac. 633]; *Monterey Coal Co. v. Superior Court*, 11 Cal. App. 207, [104 Pac. 585]; *Smith v. Smith*, 18 Wash. 158, [51 Pac. 355]; *Campbell v. Justices of the Superior Court*, 187 Mass. 509, [2 Ann. Cas. 462, 69 L. R. A. 311, 73 N. E. 659]; *White v. White*, 148 App. Div. 883, [132 N. Y. Supp. 1043].)

The identical situation presented by this application was but recently considered by the supreme court of Washington. Pending the determination of a divorce action the superior court of that state ordered the plaintiff, the wife, to keep the child of the parties to the action within the jurisdiction

of the court. She failed to comply with the order and moved the court for a voluntary dismissal of her action. The court refused to entertain the motion for the reason that the plaintiff was at the time in contempt of court for failure to obey its order. The plaintiff thereupon sought a writ of mandate to compel the superior court to hear and grant her motion. The supreme court held that the statute of Washington conferred an absolute right upon the plaintiff in the action to dismiss her action, but that as she was in contempt, she would not be allowed to present her motion to dismiss until she cleared herself of that contempt. (*State ex rel. Hunter v. Ronald*, 106 Wash. 413, [180 Pac. 125].) So, in this case, the petitioner has treated the order of the court with contempt and removed herself and the minor from the jurisdiction so that it cannot be enforced. She should not be allowed to make application for final decree of divorce until she has submitted to the lawful order of the superior court in relation to the custody of the child of the parties to the action or otherwise purged herself of the contempt.

The application for the writ is denied.

Wilbur, J., Richards, J., *pro tem.*, Lennon, J., Shurtleff, J., Sloane, J., and Shaw, C. J., concurred.

Rehearing denied.

All the Justices concurred.

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[S. F. No. 9836. In Bank.—December 22, 1921.]

J. I. MORE, Respondent, v. KATE K. HUTCHINSON, as  
Executrix, etc., Appellant.

[1] CONTRACT—BENEFIT OF THIRD PERSON—ACCEPTANCE.—While it is true that suit may be brought by the third person upon a contract entered into for its benefit immediately upon the execution of the contract, the rule arises from the fact that the suit itself is deemed an acceptance of the contract, but the true rule is that until such acceptance, there is no liability on the part of the person making the contract, but such contract, as far as the third person is concerned, amounts to a mere offer.

- [2] CORPORATIONS — ASSUMPTION OF INDEBTEDNESS — STOCKHOLDER'S LIABILITY—STATUTE OF LIMITATIONS.—Where one corporation takes over the assets of another corporation with an agreement to assume the liabilities of the latter, the obligation of the stockholders of the former to the latter corporation is barred in three years from the date of the agreement.
- [3] ID.—LIABILITY TO CREDITOR—IGNORANCE OF ASSUMPTION—TIME OF ACCRUAL.—Where a corporation took over the assets of another corporation with an agreement to assume the liabilities of the latter, among which was a promissory note, and several months thereafter the former corporation executed a new note to the creditor, who had no previous knowledge or information of the assumption of such liability and never assented thereto, the liability of the stockholders of the assuming corporation on the note accrued at the time of the execution of the note and not at the time of the assumption of the liability.
- [4] ID.—RENEWAL OF NOTE — NONEXTENSION OF STOCKHOLDERS' LIABILITY—INAPPLICABILITY OF RULE.—While it is true that where a note is given by a corporation in renewal of an existing indebtedness of its own the liability of stockholders cannot be extended by such renewal, such rule is inapplicable to a note given by the corporation in renewal of the note of another corporation whose payment it assumed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Jas. M. Troutt, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. S. Hutchinson and Walter Slack for Appellant.

Robert B. Gaylord for Respondent.

WILBUR, J.—This is an action to recover on a stockholder's statutory liability. The defense is that the cause of action is barred by the provisions of section 359 of the Code of Civil Procedure. Defendant is a stockholder in a corporation which assumed and agreed to pay an outstanding obligation of the Morris Real Estate Company. The question involved is as to whether or not the liability of the stockholders of the Palo Alto Investment Company, in which the defendant was a stockholder, accrued at the time of the assumption of this outstanding indebtedness or at the time of



the execution of the note given by the latter company to the creditor.

The district court of appeal, first district, division one, held that the liability accrued at the time of the execution of the note sued on and not at the time of the assumption of the liability. In the petition for transfer to this court it was claimed that the decision was directly contrary to the established law in this state. The transfer was made in order that this point might receive further consideration. After such consideration we are satisfied with the opinion of the district court, written by Mr. Justice Kerrigan, and adopt it as our own. [1] It is true that our authorities uniformly hold that suit may be brought by the third person upon a contract entered into for its benefit immediately upon the execution of the contract, but this rule arises from the fact that the suit itself is deemed an acceptance of the contract. The true rule is that until such acceptance by the third person there is no liability on the part of the person who assumes the indebtedness, but, as stated in the opinion of Mr. Justice Kerrigan, such contract, as far as the third person is concerned, amounts to a mere offer.

In addition to the authorities cited by the district court of appeal the following authorities support this view: *Blake v. Atlantic Nat. Bank*, 33 R. I. 464, [39 L. R. A. (N. S.) 874, note, 82 Atl. 225]; *Tweeddale v. Tweeddale*, 116 Wis. 517, [96 Am. St. Rep. 1003, 61 L. R. A. 509, 93 N. W. 440]; *Zwietusch v. Becker*, 153 Wis. 213, [140 N. W. 1056]; see cases cited in Decennial Digest, Contracts, sec. 187, subd. 5.

Appellant insists that the case of *Morgan v. Overman S. M. Co.*, 37 Cal. 534, 537, sustains his position. In that case suit was brought by a third party and the bringing of the suit constituted an acceptance. Appellant quotes from *Washer v. Independent Min. etc. Co.*, 142 Cal. 702, 708, [76 Pac. 654], as holding that the obligation accrued at once in favor of the third person without an acceptance. The quotation in appellant's petition is taken from that opinion, but is in turn a quotation from *Brewer v. Dyer*, 61 Mass. (7 Cush.) 337. Turning to that decision we find it stated: "It seems to us that the case at bar falls clearly within them, and that the agreement in question, having been made for the benefit of Brewer on a sufficient consideration, and having been accepted and adopted by him, he can well maintain his

action of assumpsit against the defendant.” (Italics ours.) Neither this Massachusetts case nor our own case are authority for the proposition that an acceptance is unnecessary.

The decision of the district court of appeal hereby adopted is as follows:

“This is an action to enforce a stockholder’s liability. The proceeding was instituted by respondent as the holder of a promissory note of the Palo Alto Investment Company, a corporation, to enforce the liability of the appellant’s testator as a stockholder of that company. Judgment was rendered in favor of plaintiff for the sum of \$1,371.83, and defendant as executor has appealed.

“The defense urged at the trial was that the action was barred by the statute of limitations, and this is the sole question presented on this appeal.

“The facts are undisputed and were established by stipulation at the trial. They may be briefly summarized as follows: The history of the transaction dates back to the year 1906. At that time one J. J. Morris and Marshall Black borrowed seven thousand five hundred dollars from the Crocker National Bank, giving their note therefor. In 1908 this note was taken up by the individual note of Morris. In 1912 the Morris Real Estate Company assumed payment thereof. There was then due and unpaid thereon the sum of \$5,545. In March of the same year the Palo Alto Investment Company was organized for the purpose of taking over the assets and liabilities of the Morris Company, and this arrangement was consummated at that time; and later, on April 29, 1912, the Palo Alto Investment Company executed an instrument acknowledging receipt of a conveyance from the Morris Company of its assets, and in consideration of this transfer it thereupon agreed to assume the liabilities of that company, among which was the note in question. About seven months thereafter and on December 4, 1912, the board of directors of the Palo Alto Company adopted a resolution to renew this promissory note by executing a new note for \$5,545, payable to the Crocker Bank. The note was accordingly executed by the Palo Alto Company, drawn to its own order, indorsed by it in blank and delivered to and accepted by the Crocker National Bank, which in turn subsequently transferred the note to plaintiff, who thereafter on November 29, 1915, commenced this action. This was the last day

of the three-year period established by section 359 of the Code of Civil Procedure, when computing the time from the date of the note.

“It is appellant’s contention that decedent’s liability as a stockholder of the Palo Alto Investment Company to the Crocker Bank was created by the consummation of the agreement between the Morris Company, by which the former conveyed its assets to the latter, which in turn assumed the liabilities of the former, and that the stockholders’ liability began to run from the date of this agreement. Respondent, on the other hand, insists that the indebtedness was incurred at the time the note was executed and not before. There is no showing in the record that the bank ever knew of the existence of the obligation of the Palo Alto Company to assume the liabilities of the Morris Company, or that it ever assented to it in any way, or accepted its benefits or its burdens prior to the time that it might be charged with such knowledge by its acceptance of the note in suit.

“The contention of the appellant is based upon the doctrine laid down in *Hunt v. Ward*, 99 Cal. 612, [37 Am. St. Rep. 87, 34 Pac. 335], and subsequent cases, to the effect that actions based upon a stockholder’s liability must be brought within three years after the liability is created. If the doctrine invoked can be made to apply to this case so as to successfully avail appellant, then a situation is presented of a person being made a party to a contract and foreclosed of certain rights thereunder based upon facts of the existence of which he has absolutely no information or knowledge whatsoever and to which he has never assented. We are cited to no authority supporting such a principle.

[2] “There is no question that it is the settled law of this state that the statute of limitations begins to run in favor of the stockholder of a corporation at the time the debt against the corporation is created; and that under this principle the obligation of the Palo Alto Investment Company’s stockholders to the Morris Company, being incurred when the agreement of April 12, 1912, was executed, was barred as against the Morris Company in three years from that date. [3] Quite different, however, is the situation of the bank in its transaction with the Palo Alto Company. It never knew of and, consequently, never assented to the agreement transferring its claim until the new note was executed

in its favor and it accepted the same on November 29, 1912, the day the note bore date. So far as the record shows, this is the only knowledge or information that it had concerning the entire transaction.

“Appellant claims that the assent of the bank was in no manner essential to the creation of the liability of the Palo Alto Company or the accruing of the action in favor of the bank against such company, for the reason that where, as here, one corporation takes over the assets of another with an agreement to assume the liabilities of the latter, the creditors of the old corporation may enforce the agreement against the new corporation, citing *Morgan v. Overman etc. Co.*, 37 Cal. 534; *Stanford Hotel Co. v. Schwind*, 180 Cal. 348, [181 Pac. 780]. Authority in support of this principle is unnecessary. Our Civil Code (sec. 1559) expressly provides that ‘a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.’

“A contract for the benefit of a third person, however, like any other contract, requires an acceptance; and until such acceptance is manifested in some manner no rights creating a corresponding liability in favor of such party can arise. Until then the transaction amounts to a mere offer. (13 Corpus Juris, 711; *Johnson v. Central Trust Co.*, 159 Ind. 605, [65 N. E. 1028].) The exemption from liability here claimed by appellant finds no support in the doctrine announced in *Hunt v. Ward*, *supra*. If the operation of the statute could be set in motion against the bank seven months before it had any knowledge of the liability created in its favor and to which arrangement it had never assented, it might be conceded for a period beyond which any liability against stockholders might be invoked. In other words, the statute could toll against a right of the existence of which one was ignorant by reason of the fact that he had never assented to the agreement out of which it arose. We cannot subscribe to such a doctrine.

[4] “Equally untenable is the appellant’s contention that the note of the Palo Alto Company was a mere renewal, one which did not extend the time prescribed in the statute. It is undoubtedly true that where a note is given by a company in renewal of an existing indebtedness of its own, the liability of stockholders of such company cannot be re-

vived or extended by such renewal or extension. (*Hyman v. Coleman*, 82 Cal. 65, [16 Am. St. Rep. 178, 23 Pac. 62]; *Goodall v. Jack*, 127 Cal. 258, [59 Pac. 575].) Here, however, no such condition is presented. The transaction under consideration was a new and independent contract made with a different company. Under such circumstances it cannot be said that the new note was a renewal of the old one. The bank had the right to, and undoubtedly did, rely upon the right of recourse to the stockholders of the new company in accepting its note."

Judgment affirmed.

Lennon, J., Shaw, C. J., and Shurtleff, J., concurred.

SLOANE, J., Dissenting.—I dissent. From whatever standpoint we view the transaction, it seems to me the liability impressed upon the defendant as a stockholder of the Palo Alto Investment Company was created when that corporation in its contract with the Morris Real Estate Company agreed to pay the latter's indebtedness to plaintiff's assignor, the Crocker National Bank.

That obligation was the foundation of defendant's liability. It was the only consideration for the note subsequently given by the corporation and sued on in this action. Whether the note was an extension or a renewal of the original liability, it, in neither case under the established rule in this state, could stay the statute of limitations as to the defendant.

I do not think it is at all clear that an acceptance was necessary by the plaintiff here before a complete accrual of a cause of action in its favor upon the obligation assumed by the Palo Alto Company.

Section 1559 of the Civil Code declares that such a contract may be enforced by the third party "at any time." Notice of acceptance is not required. He may sue precisely as upon a direct contract in his favor. Our decisions, so far as they go, seem to recognize such a contract as in itself establishing the cause of action. As said in *Washer v. Independent M. & D. Co.*, 142 Cal. 702, 709, [76 Pac. 654], the action "does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the law operating upon the acts of the parties, creates

the duty, establishes privity, and implies the promise and obligation on which the action is founded."

The case of *Tweeddale v. Tweeddale*, 116 Wis. 517, [96 Am. St. Rep. 1003, 61 L. R. A. 509, 93 N. W. 440], one of the decisions cited in Mr. Justice Wilbur's opinion, we think is misapprehended therein. While it recognizes authority in the books for the doctrine that the third party does not become possessed of the benefit of the promise until he accepts it, the court, after an elaborate review of the authorities, reaches the following conclusion: "Without further discussion of the matter we adhere to the doctrine that when one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and the third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of the occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person, without his consent."

The suggestion that to apply the bar of the statute of limitations in this case, during a period when the plaintiff probably had no knowledge of his right of action against the defendant, would be unfair and unreasonable, is beside the point. Obviously the statute did run against the original liability from the date of the assumption of the debt. If there had been no new obligation entered into by the Palo Alto Company by making of the note to plaintiff, defendant's liability would clearly have expired, even if plaintiff had never heard of the transaction. If the action is not barred it is because the note created a new and independent indebtedness of the corporation.

Even if notice to and acceptance by the beneficiary of the contract was necessary, it had such notice and made such

acceptance when it received this new note of the Palo Alto Company for the old note of the Morris Company. The old note was surrendered on the making of the new, and the only consideration was the renewal or satisfaction of the old debt, the one by which defendant's statutory liability was originally created. The complaint in this action recognizes the assumption by the Palo Alto Company of the liabilities of the Morris Company as the basis of its claim. There is set forth in the complaint the facts that plaintiff's assignor in the first instance held the obligation of the Morris Company for its indebtedness, that the Palo Alto Company took over the assets of the former, and executed this new note "in renewal" of the Morris Company note. The logical deduction from this state of facts is that the parties met in the execution of the new note upon a mutual recognition of the liability which had been assumed by the Palo Alto Company to pay to the Crocker Bank the old indebtedness of the Morris Company. The new note of the Palo Alto Company to the Crocker Bank was received in recognition and settlement of that liability.

Clearly, the only claim the Crocker Bank had upon the Palo Alto Company was by reason of the latter's assumption of the indebtedness of the Morris Company. Had the bank rested its claim on that liability, it would have had to begin its action within three years after the assumption of the debt. Instead, it consented to take a "renewal" note. This could not be done to the prejudice of the stockholders' rights, to rest on the original liability.

Rehearing denied.

All the Justices concurred, except Sloane, J., who did not vote.



[L. A. No. 6217. In Bank.—December 23, 1921.]

**JENNIE WALZ TURNER, Appellant, v. LEWIS MANEY  
TURNER, Respondent.**

- [1] **DIVORCE—EXTREME CRUELTY—CONFLICT OF EVIDENCE—FINDINGS—APPEAL.**—Where in an action for divorce on the ground of extreme cruelty the evidence is in substantial conflict as to each and all of the alleged acts, the findings, if in themselves sufficient to respond to such issues, will not be disturbed.
- [2] **ID.—GENERAL FINDING—CONCLUSION OF LAW.**—A general finding in such an action that the defendant has not been guilty of extreme cruelty or any cruelty toward the plaintiff, and has not wrongfully or at all inflicted upon the plaintiff grievous or any bodily injury, or grievous or any mental suffering, is not sufficient to respond to the issues nor to support the judgment, since it is nothing more than a conclusion of law.
- [3] **ID.—TRUTH AND FALSITY OF MATERIAL ALLEGATIONS — INSUFFICIENCY OF FINDINGS.**—General findings in such an action that each and every material allegation contained in plaintiff's complaint is untrue, and that each and every material allegation contained in defendant's answer is true, are insufficient to support the judgment, since they are uncertain as to what averments are deemed material.
- [4] **ID.—SPECIFIC AND GENERAL FINDINGS—SUPPORT OF JUDGMENT.**—Where in an action for divorce on the ground of extreme cruelty the court, in addition to general findings, made specific findings as to the truth or falsity of each and all of the particular averments of cruelty set forth in the complaint, and found them to be either untrue or unsustained by sufficient evidence, the generalities in the findings may be disregarded.
- [5] **ID.—DESEPTION—EVIDENCE—SEPARATION BY MUTUAL CONSENT.**—In an action for divorce on the ground of desertion, a finding against the plaintiff is justified on evidence sufficient to justify the conclusion that the separation was by mutual consent.
- [6] **FINDING—NEGATION OF ALLEGATION OF COMPLAINT—SUFFICIENCY.** A finding which is in identical language a negation of the allegation in the complaint is sufficient.
- [7] **ID.—CONSTRUCTION OF FINDINGS.**—Findings are to be construed so as to support the judgment.
- [8] **DIVORCE—EXTREME CRUELTY—UNCERTAINTY OF SPECIFIC FINDING — INSUFFICIENT GROUND OF REVERSAL.**—Where in an action for divorce on the ground of extreme cruelty the court made general findings that the defendant had not at any time or at all been guilty of extreme cruelty toward the plaintiff, the judgment in

favor of the defendant will not be reversed because of uncertainty in a specific finding upon a single charge of cruelty as to whether, by reason of its partly disjunctive and partly conjunctive form, it was in favor of or against the allegation of the complaint.

[9] ID.—EVIDENCE—CAUSE OF MARITAL UNHAPPINESS—STATEMENT TO PHYSICIAN—HEARSAY.—In such an action a statement made by the plaintiff to her physician regarding her husband's treatment of her as affecting the unhappiness of her married life was inadmissible, where not part of the *res gestae* or necessary to enable the physician to determine the nature of her malady.

APPEAL from a judgment of the Superior Court of Los Angeles County. J. P. Wood, Judge. Affirmed.

The facts are stated in the opinion of the court.

Goudge, Robinson & Hughes for Appellant.

W. I. Gilbert and Maury Kemp for Respondent.

RICHARDS, J., *pro tem.*—This appeal is from a judgment in favor of the defendant in an action for divorce upon the grounds of extreme cruelty and desertion. The parties intermarried on September 16, 1899, in El Paso, Texas. Several children were born of said marriage, of whom there were living, at the time this action was instituted, three daughters, whose names and ages were: Virginia, aged seventeen years; Marion, aged twelve years, and Jane, aged two years.

Plaintiff sets forth in the first count of her complaint certain acts and conduct of the defendant which are alleged to have caused said plaintiff great mental suffering and a nervous breakdown, seriously impairing her health. It is not necessary to consider these allegations in detail for the reasons hereinafter stated, with the exception of the following averment. The complaint alleges:

“That, within one year last past, the said defendant has, at diverse times, falsely and willfully insinuated and stated to the two older children of the plaintiff and defendant that the plaintiff was not a proper person to have the care, custody and upbringing of the said children and has questioned the said two older children as to the acts and conduct of the plaintiff during the absence of the defendant, in such a manner as to tend to cause them to believe that the plain-

tiff's acts and conduct have not been proper, but that defendant well knew, at the time, that the plaintiff had been guilty of no improper conduct, and that it was the purpose and intention of said defendant to prejudice the said children against the plaintiff."

The defendant in his answer specifically denies the above allegation. Upon the trial and submission of the cause the court made the following finding in respect thereto:

"The court finds that the defendant did not, within one year last past, or at any time or at all, falsely, or willfully or at all insinuate or state to the two older children of the plaintiff and defendant, or to either of said children, that the plaintiff was not a proper person to have the care, or custody, or upbringing of said children and finds that the defendant has not questioned the said two older children as to the acts and conduct of the plaintiff during the absence of the defendant, in such a manner as to tend to cause them to believe that the plaintiff's acts or conduct had not been proper, when the defendant knew at said time that the plaintiff had been guilty of no improper conduct, and the court finds that it was not the purpose or intention of said defendant to prejudice the said children against the plaintiff."

The appellant urges several contentions upon this appeal, the first of which is that the evidence is insufficient to justify the findings of the trial court upon the various acts of alleged cruelty, other than the specific act embraced in the foregoing averment and finding. [1] It is sufficient to say in response to this contention that as to each and all of these acts of alleged cruelty, with the exception above noted, the evidence is in substantial conflict, and this being so the findings of the trial court, if in themselves sufficient to respond to these issues, will not be disturbed. The appellant, however, contends that the findings of the trial court upon these several alleged acts of cruelty, other than that above specifically referred to, are insufficient to respond to the issues therein presented, and hence insufficient to support the judgment. An examination of the findings of the court discloses that at the outset the court made the following general finding having relation to the first count of the plaintiff's complaint:

"The court finds that the defendant has not, at divers times within eighteen years last past, or at any time or at

all, been guilty of extreme or any cruelty toward the plaintiff, and has not wrongfully or at all inflicted upon the plaintiff grievous or any bodily injury, or grievous or any mental suffering.”

It will further be noted that toward the close of its findings the court made the following two general findings:

“And the court further finds that, except as herein found to the contrary, each and every material allegation contained in plaintiff’s complaint herein is untrue.

“The court finds that, except as herein found to the contrary, each and every material allegation contained in the defendant’s answer is true, as therein stated.”

[2] It may be conceded that the foregoing general findings would, neither separately nor in conjunction, be sufficient to respond to the issues above referred to, nor to support the judgment; the first, because standing alone it would amount to nothing more than a conclusion of law. (*Franklin v. Franklin*, 140 Cal. 607, [74 Pac. 155]; *Smith v. Smith*, 62 Cal. 466.) [3] It may also be conceded that the further and concluding findings of the court above quoted would also be insufficient to support the judgment for the reason that they are each subject to the vice pointed out in the case of *Holt Mfg. Co. v. Collins*, 154 Cal. 276, [97 Pac. 520], wherein the court said: “The general omnibus finding that all the material denials and averments in answer to the complaint herein are true and all of the material averments of the amended complaint in intervention are true, is insufficient for any purpose.” The reason is that it is uncertain; no one can know what averments were deemed material. (See, also, *Johnson v. Squires*, 53 Cal. 37; *Ladd v. Durkin*, 54 Cal. 395; *Krug v. F. A. Lux etc. Co.*, 129 Cal. 322, [61 Pac. 1125]; *Stampfli v. Stampfli* (Cal. App.), 199 Pac. 829.)

[4] The difficulty with the appellant’s foregoing contention as to the insufficiency of these findings is that the trial court did not content itself with the general findings above criticised, but proceeded to make specific findings as to the truth or falsity of each and all of the particular averments of cruelty set forth in the plaintiff’s complaint, with the exception above noted, and as to these found them to be either untrue or unsustained by sufficient evidence. The generalities in the court’s findings may, therefore, be disre-

garded and the contention of the appellant with regard to the insufficiency of such findings to support the judgment be held to be without merit.

[5] It may be said that as to the second count of the plaintiff's complaint alleging desertion there was sufficient evidence before the court to justify the conclusion that whatever separation there was between the parties was by mutual consent, which would suffice to justify the finding which the court made against the plaintiff upon that alleged cause of action.

This brings us to the main contention of the appellant as to the insufficiency of the evidence to support the finding and of the findings to sustain the judgment of the trial court in relation to the averment and finding first above specifically set forth. As to that finding, it is the contention of the appellant in substance that it is ambiguous and misleading, and that, drawn as it is in a partly disjunctive and partly conjunctive form, it cannot be determined therefrom whether it is to be understood as a finding in favor of or against the allegations of the plaintiff's complaint as to the specific charge referred to in said finding. The appellant further contends that if said finding is to be construed as a finding against the plaintiff as to this specific charge it is unsupported by the evidence in the case. [6] In answer to the first of these contentions it may be stated generally that a finding which is in identical language a negation of the allegation in the complaint is sufficient. (*Dam v. Zink*, 112 Cal. 91, [44 Pac. 331]; *McCarthy v. Brown*, 113 Cal. 15, [45 Pac. 14]; Hayne on New Trial and Appeal, Rev. ed., sec. 242.) [7] It should also be stated as a general rule that findings are to be construed so as to support the judgment. It was evidently the intention of the trial court in this case to make a finding against the plaintiff in the identical language of the complaint, except as such finding was attempted to be cast in the negative form. [8] Its efforts so to do may have resulted in giving to such finding the doubtful and ambiguous meaning of which the appellant complains, but, even if this be conceded to be true, it does not, therefore, follow that the judgment should be reversed for that reason, since even if said finding should be given the construction which the appellant claims for it, and even if it were true that said finding was a clear and unambiguous finding of fact in

favor of the plaintiff upon this single charge of cruelty, it must still be read in conjunction with the conclusion of the trial court above quoted to the effect that the defendant has not at any time or at all been guilty of extreme cruelty toward the plaintiff. Such findings read together and taken in connection with the other specific findings of the court against the plaintiff as to every other specific charge of cruelty averred in her complaint would amount to the finding that the single act of alleged cruelty intended to be covered by the objectionable finding was insufficient in itself to amount to extreme cruelty so as to entitle the plaintiff to a divorce. If our reasoning and conclusion in this regard be correct, it follows that the appellant's second contention that said finding, if taken to be a finding against her, is unsupported by the evidence, becomes immaterial, since even if said finding were clearly in accord with the evidence it would still be insufficient, according to the trial court's conclusion, to constitute extreme cruelty so as to justify a judgment of divorce.

[9] The appellant further urges that the trial court committed error in the rejection of certain evidence offered on her behalf. The plaintiff's physician was called by her and testified as to certain troubles existing in her sexual organs and a general nervous condition due to such trouble. He was then asked the question as to whether she made any statement to him as to the cause or reason of her condition, which question he answered affirmatively. He was then asked: "What did she say about it?" which question was objected to and the objection sustained. He was then asked as to whether he had formed an opinion as to the reason for or cause of her condition. Upon an objection being urged to this question, the court inquired of the physician whether he could tell from his objective examination what the cause of the condition of the plaintiff was, and upon his answer that he could do so relatively he was permitted by the court to answer, limiting his reason to what he ascertained from objective examination. The trial court also refused to allow another witness called on behalf of the plaintiff to testify as to statements and complaints made to her by the plaintiff of unhappiness in her married life. We see no error in the rulings of the trial court in regard to these two witnesses. Whatever statement the plaintiff may have made to her

physician regarding her husband's treatment of her as affecting the happiness or unhappiness of her married life would not be the less hearsay and self-serving declarations when made to him than when made to any other person not a physician. They were not part of the *res gestae*, as was the case in *Venzke v. Venzke*, 94 Cal. 225, [29 Pac. 499], cited by appellant, nor does it appear that they were necessary to enable the physician to determine the nature of her malady, to which he fully testified as the result of his objective examination. The only purpose for which the evidence of these two witnesses apparently was offered was to show that the plaintiff had made statements to each of them as to the unhappiness of her married life. Such evidence was clearly hearsay and inadmissible.

The judgment is affirmed.

Wilbur, J., Waste, J., Shaw, C. J., Lennon, J., Sloane, J., and Shurtleff, J., concurred.

Rehearing denied.

All the Justices concurred.

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[S. F. No. 10,090. In Bank.—December 24, 1921.]

ELIAS GUMILLA et al., Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

- [1] WRIT OF REVIEW—ORDER IN ADVANCE OF FINAL ADJUDICATION.—A writ of *certiorari* does not lie to review an order made in a matter prior to the final adjudication thereof.
- [2] WORKMEN'S COMPENSATION ACT—ORDER GRANTING REHEARING—WRIT OF REVIEW—PREMATURE APPLICATION.—A writ of *certiorari* will not lie to review an order of the Industrial Accident Commission granting a rehearing of an award where the application for the writ is made before the final decision of the commission on the rehearing.

APPLICATION for a Writ of *Certiorari* to review and annul an order of the Industrial Accident Commission granting a rehearing of an award of compensation. Denied.

The facts are stated in the opinion of the court.



Russell P. Tyler for Petitioners.

A. E. Graupner for Respondents.

SHAW, C. J.—On August 26, 1921, the Industrial Accident Commission made an award in favor of the petitioners herein allowing them compensation as dependents of one Miguel Gumilla, on account of the death of said Gumilla from an injury received by him while in the employment of the California Hawaiian Sugar Refining Company. Notice of this award was served upon the adverse parties on the same day. The time for filing a petition for rehearing by the adverse parties expired on September 16, 1921. No petition was filed within that time, but on September 20, 1921, the said adverse parties filed with the Industrial Accident Commission a petition for a rehearing of the award made on August 26th, aforesaid. Thereafter, on November 16, 1921, an affidavit was filed on behalf of said parties, in effect showing that the failure to file the said petition for rehearing in time was the result of the inadvertence or neglect of their attorney. Thereupon, on November 19, 1921, the Industrial Accident Commission made an order declaring that the failure to file the petition within the twenty days allowed by the law was the result of inadvertence, surprise, and excusable neglect sufficient to excuse the failure, and thereupon it made an order as follows: "It is ordered that the petition for rehearing be, and it is hereby ordered filed *nunc pro tunc* as of September 16, 1921." At the same time the Industrial Accident Commission made an order granting the application for a rehearing, and ordered the case to be submitted on the testimony already taken without further hearing. No decision of the matter on such submission has been made and the matter is still pending. The matter now before the court is the petition of Elias Gumilla and Paulina Gumilla to review and annul the order of the Industrial Accident Commission granting a rehearing, and that this court thereupon order that the findings and award originally made are final.

[1] A writ of *certiorari* does not lie to review an order made in a matter prior to the final adjudication thereof. The Industrial Accident Commission proposes to decide the case again after the order granting the rehearing, but it

has not yet done so. Final action thereon has not yet been taken. [2] Under these circumstances, the application for a writ of review of the order granting a rehearing is premature. (*Holabird v. Railroad Com.*, 171 Cal. 691, [154 Pac. 831]; *Gauld v. Board of Supervisors*, 122 Cal. 18, [54 Pac. 272].) The petitioners' remedy in such a case is to await the final decision and ask for a rehearing of the matter. This, of course, will search the record for lack of jurisdiction, and if there is such lack anywhere down the line which deprives the Industrial Accident Commission of jurisdiction to make the final decision, the proceedings will be annulled so far as may be necessary to give the petitioners appropriate relief. But until such final decision of the commission we cannot consider the validity of the order granting the rehearing in this manner.

It may be that effectual relief could be given by this court or the district court of appeal under its general jurisdiction by means of a petition for a writ of prohibition. As the question is not before us, we express no opinion on that subject.

For the reasons above set forth the petition for a writ of review is denied.

Shurtleff, J., Wilbur, J., Sloane, J., Lennon, J., and Waste, J., concurred.

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[Crim. No. 2367. In Bank.—December 28, 1921.]

In the Matter of HAROLD HOLMES on Habeas Corpus.

[1] MUNICIPAL CORPORATIONS—SAN FRANCISCO—OCCUPATIONAL TAX ORDINANCE—CONSTRUCTION OF TERM "GOODS, WARES AND MERCHANDISE"—DEALERS IN SECOND-HAND BOOKS.—The words "goods, wares and merchandise" as employed in article II, chapter 2, section 15, of the charter of the city and county of San Francisco, and in the ordinance, adopted pursuant to such charter provision, imposing license taxes on certain businesses, callings, trades, and employments, includes books, and a person engaged in the busi-

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1. Police power as exercised by municipalities over the business of pawnbrokers, junk dealers, and dealers in second-hand goods, note, 32 L. R. A. 116.

ness of buying, selling, and exchanging second-hand books, as a principal occupation, and not as a mere incident to some other business, is required to pay the tax.

[2] **ID.—PROCURING OF PERMIT FROM POLICE COMMISSIONERS—REASONABLE REGULATION.**—The requirement of the ordinance of the city and county of San Francisco imposing license taxes on certain businesses, callings, trades, and employments, that every person engaged in the business of buying, selling, or exchanging second-hand books shall procure a permit from the board of police commissioners before engaging in such business is a proper and reasonable regulation.

[3] **ID.—ISSUING OF PERMITS—POWER OF SUPERVISORS—CHARTER—CONSTITUTIONAL LAW.**—The investment of the board of police commissioners of the city and county of San Francisco with the general and unqualified power to grant or refuse permits to dealers in second-hand merchandise as contained in article VIII, chapter 3, section 9, of the charter, is not unconstitutional as conferring arbitrary powers upon the board.

**PROCEEDING** on Habeas Corpus to secure release from custody upon a charge of refusal to pay a municipal license tax. Writ dismissed.

The facts are stated in the opinion of the court.

F. D. Brandon and R. P. Henshall for Petitioner.

Matthew Brady, District Attorney, I. M. Golden, Assistant District Attorney and J. A. Pritchard for Respondent.

**THE COURT.**—The petitioner herein applied for and was granted a writ of *habeas corpus* by which he sought to have determined the legality of his arrest and detention upon a complaint filed in the police court of the city and county of San Francisco charging him with having engaged in the business of buying, selling, and exchanging second-hand books in said city and county of San Francisco without having obtained a municipal license so to do, and in violation of the provisions of section 63 of Ordinance No. 5132 of said city and county, requiring such license, and of his conviction and imprisonment under said charge.

Upon the hearing of said application it was stipulated that the complaint upon which the petitioner was arrested and convicted sufficiently charged the commission of the act alleged therein as constituting said offense, thus leaving as the only

matters for our determination the construction of the provisions of the charter of said municipality under the terms of which the ordinance under which the petitioner was convicted was drawn, and of the said ordinance for the alleged violation of which such conviction was had.

In article II, chapter 2, section 15, of the charter of San Francisco, it is provided that the board of supervisors have power:

“15. To impose license taxes and to provide for the collection thereof; but no license taxes shall be imposed upon any person who, at any fixed place of business in the City and County, sells or manufactures goods, wares or merchandise, except such as require permits from the Board of Police Commissioners as provided in this Charter.”

In article VIII, chapter 3, section 9, of said charter, it is provided that the board of police commissioners shall have power:

“9. To grant or refuse to grant permits to any person engaged or desiring to engage in business as pawnbroker, peddler, junkshop keeper, dealer in second-hand merchandise, . . . and such other characters of business or callings as may hereafter be required by ordinance enacted by the Board of Supervisors to obtain permits from this Board.”

In article VIII, chapter 4, section 7, of said charter, it is provided that:

“7. The Chief of Police shall possess powers of general police inspection, supervision and control over all pawnbrokers, peddlers, junk-shop keepers, dealers in second-hand merchandise, auctioneers and intelligence office keepers. All persons engaged in said callings must first procure permits from the Commissioners.”

On July 1, 1920, the board of supervisors of said municipality adopted an ordinance entitled, “License Ordinance No. 5132, New Series,” imposing license taxes on certain businesses, callings, trades, or employments within the city and county of San Francisco.

“Second-hand Goods.

“Section 63: Every person, firm or corporation engaged in the business of buying, selling or exchanging second-hand goods, such as provisions, goods, wares, merchandise, medicines, drugs, jewelry, precious metals or wares, shall (after securing a quarterly permit from the Board of Police Com-

missioners to carry on the business), pay a license of twenty-five (25) dollars per quarter."

It was under the foregoing ordinance, and for the alleged violation thereof, that this petitioner was arrested, convicted, and confined. It is his contention that as a person engaged in the business of dealing in second-hand books he does not come within the terms of said ordinance, and, hence, could not legally be made the subject of conviction thereunder. He makes the further contention that the business of a dealer in second-hand books is not such a business as requires regulation under the police power of the municipality, or the application for an issuance of permits as a condition precedent to the right to conduct such business; and, finally, the petitioner contends that the grant of power to the police commission to issue or deny permits to conduct such business is illegal as conferring arbitrary powers upon said board.

[1] The appellant's first above contention involves an inquiry as to the meaning of the words "goods, wares and merchandise" as employed in the several sections of the charter of San Francisco above quoted, and as to the scope and meaning of the same term as found in the ordinance under the provisions of which the petitioner was convicted and confined. The appellant's first contention is that the words "goods, wares and merchandise" as used in the sections of the charter and of the ordinance above set forth are not to be construed either singly or collectively as including books. This contention cannot be sustained. The word "goods" is defined in Webster's New International Dictionary as "movables; household furniture; personal or movable estate; wares; merchandise; commodities bought and sold by merchants and traders." The earliest definition of the word "goods" is to be found in Bailery's Large Dictionary issued in 1732, which defines it as "merchandise." Samuel Johnson, the next English lexicographer, defined "goods" as "movables in a house; wares; freight; merchandise." The term "wares" is also defined in the dictionaries as a synonym of "merchandise," while the term "merchandise" is defined by Webster and the other lexicographers as "the objects of commerce; whatever is usually bought and sold in trade, or market, or by merchants; wares, goods, commodities." In the case of *Blackwood v. Cushing*

*Packing Co.*, 76 Cal. 212, [9 Am. St. Rep. 199, 18 Pac. 248], in construing the meaning of the word "merchandise," as used in section 1768 of the Civil Code, it was stated that it "covers all kinds of personal property which is bought and sold in the market." The term "merchandise" as used in acts and ordinances relating to taxation has been construed to cover all kinds of personal property. (*Loeber v. Leininger*, 175 Ill. 487, [51 N. E. 703]; *Wynne v. City of Eastman*, 105 Ga. 614, [31 S. E. 737]; *City of Pittsburg v. Klatchthaler*, 114 Pa. 547, [7 Atl. 921].) The phrase "goods, wares and merchandise" when thus used in conjunction have been given an even more inclusive meaning, since it is stated in Cyc. under that title that "these words are constantly used in legal and common parlance to distinguish whatever species of property is not embraced in the phrase lands, tenements and hereditaments." Cases almost without number might be cited as embracing and approving these general definitions of these words. The following may be referred to as bringing these definitions somewhat nearer to the particular form of personal property involved in this proceeding. In the case of *Smith v. Wilcox*, 24 N. Y. 353, [82 Am. Dec. 302], it was held that the words "goods, wares and merchandise," as used in a statute prohibiting the sale of "goods, wares and merchandise" on Sunday, included the sale of newspapers on that day, while in the case of *Commonwealth v. Nax*, 13 Gratt. (54 Va.) 789, it was held that a dealer in published music was bound to obtain a license under a statute requiring merchants selling at any store or place "any goods, wares and merchandise" to take out such license, the court saying that this phrase as used in the statute was "applicable to the kinds of merchandise to be found exhibited for sale in the store of every bookseller and stationer in the country." The case of *Eastman v. City of Chicago*, 79 Ill. 178, relied upon by the petitioner, does not militate against the foregoing cases, for the reason that in that case it appeared that the dealer was generally engaged in the business of selling legal blanks, stereoscopes, engravings, paintings, and children's toys and games, and, incidental thereto, had for sale a few rare and old imported books which were rather to be classed with paintings or works of art than as second-hand books, in the sense in which that term is usually understood; while in the case at bar it is stipulated that the

petitioner is engaged in the business of buying, selling, and exchanging second-hand books, not as a mere incident to some other occupation, but as his principal business.

It is needless to pursue the subject further than to say that if the construction to be placed upon the phrase "goods, wares and merchandise," as contended by the petitioner, were to be adopted, dealers in books would be generally exempted from taxation under the common form of assessment of "goods," or of "goods, wares and merchandise" contained in their stores.

[2] Appellant's next contention is that the business of dealing in second-hand books is not such a business as requires or should be subjected to regulation under the police powers of the municipality, and hence that the requirement that such persons shall procure permits from the board of police commissioners before engaging in such business is an unwarranted and illegal regulation. This contention is also, in our opinion, without merit. Second-hand goods, wares, and merchandise have always been deemed the proper subjects of police regulation by municipalities (see "Constitutional Law," 8 Cyc. 875, and cases cited); and the grant by the constitution in article XI, section 11 thereof, to municipalities "to make and enforce all such local, police, sanitary and other regulations as are not in conflict with general laws," is very broad and liberal. The business of buying and selling second-hand books cannot be differentiated from the business of buying and selling other forms of second-hand personal property which, being movable, valuable, and passing easily from hand to hand, are often made the subject of purloining and petit larceny and of disposal in second-hand places of business. Such places of business have, therefore, been made the proper subjects of police inspection and regulation. It is a matter of common knowledge that public libraries all over the country are continually subjected to the depletion of their shelves through loss of books which find their destination in second-hand stores, and that precautions against such loss may be observed in the equipment and administration of every well-appointed public library in the land. It cannot be said, therefore, that the requirement in section 7 of the charter, above quoted, that "the chief of police shall possess powers of general inspection, supervision and control over all . . . dealers in second-hand merchan-



dise" and that "all persons engaged in said callings must first procure permits from the commission," is an unreasonable form of regulation. This subject might be pursued into the domain of health regulation, since it may be said to be also a matter of common knowledge that books, magazines, and like publications which pass through many hands, and perchance through many households, have frequently been found the prolific carriers of infectious diseases. For both of the foregoing reasons we hold that the subjection of dealers in second-hand books to police regulation to the extent of requiring such persons to procure permits as a prerequisite to engaging in the business of selling such second-hand merchandise is a proper and reasonable regulation.

[3] The petitioner's next contention is that the investment of the board of police commissioners with the general and unqualified power to grant or refuse permits to dealers in second-hand merchandise, as contained in the provisions of the charter above quoted, is unconstitutional as an attempt to confer arbitrary power upon that body to grant or refuse permits at their whim or pleasure. The best answer to that contention is to be found in Dillon on Municipal Corporations (fifth edition), page 937, wherein the learned author says: "Many cases are to be found sustaining ordinances prohibiting acts, or even the following of trades or occupations, without procuring permits which may be issued at the discretion of the council, mayor, or some other city officer or department, and the fact that the dispensing power was apparently conferred without restraint or qualification has been regarded as arising merely from the difficulty of defining in advance upon what conditions the permits shall be given or the dispensing power exercised. It has been said that it is not to be assumed that the council or officer, in exercising the dispensing power, will act arbitrarily, or otherwise than in the exercise of a sound discretion."

The appellant, however, insists that this court has decided in the case of *In re Dart*, 172 Cal. 47, [Ann Cas. 1917D, 1127, L. R. A. 1916D, 905, 155 Pac. 63], that the grant of arbitrary power to municipal boards or officials to grant or refuse permits is void. It is to be noted, however, that whatever was said in that case with respect to the grant of such powers had reference to the facts of that particular case; and that this court, in the case of *Gaylord v. City of Pasa-*

*dena*, 175 Cal. 433, [166 Pac. 348] pointed out that the Dart case dealt with the control of charitable institutions and charities, and that the decision in that case went not alone to the unreasonable and arbitrary grant of power conferred by ordinance upon a charity commission, but to the fundamental proposition that the city council of Los Angeles had empowered this board to do acts which the city council itself, the source of power, could not legally do. In both of the foregoing cases the earlier decisions of this court are cited and distinguished as having relation to things which in their nature are, or may be, injurious to public health, safety, comfort, or welfare. The cases of *Ex parte Fiske*, 72 Cal. 127, [13 Pac. 310], and *In re Flaherty*, 105 Cal. 558, [27 L. R. A. 529, 38 Pac. 981], are referred to particularly in the concurring opinion of Mr. Justice Shaw, as upholding the view that as to those kinds of occupations or businesses which are the proper subjects of police surveillance and regulation, the delegation of power to municipal boards or officials to grant or refuse permits will be sustained. In *Gaylord v. City of Pasadena, supra*, the court quotes approvingly from the case of *In re Flaherty, supra*, these words: "Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously or for purposes of oppression or mischief." If this petitioner had applied for a permit under the requirement of the section of the charter above quoted, and been either whimsically or arbitrarily refused such permit, he might then, as is shown in *Gaylord v. City of Pasadena, supra*, have had recourse to the courts for relief from such unjust and arbitrary action.

The appellant's final contention, that second-hand book dealers ought not now to be required to obtain permits and pay licenses because they have not heretofore been required to do so during the years that have passed since the charter of San Francisco went into effect, is not worthy of serious consideration.

Writ dismissed and petitioner remanded.

Richards, J., *pro tem.*, Shaw, C. J., Lennon, J., Waste, J., Shurtleff, J., and Sloane, J., concurred.

WILBUR, J., Concurring.—I concur in the judgment. The sole question in this case is the validity of the ordinance imposing a license tax upon the petitioner's business. It is conceded that under the general power of taxation this might be done. It is contended, however, that, under the provisions of the charter of San Francisco, that power is expressly taken away from the board of supervisors. This question turns upon the provisions of the charter concerning a permit. If the business is one requiring a permit it is taxable; if not, it cannot be taxed. As shown in the main opinion, the business in question is one for which, under the provisions of the charter, a permit may be required. It follows that the business is properly subject to a license tax. Whether or not the provisions of the charter or ordinances passed in pursuance thereof requiring a permit are valid as an exercise of the regulatory power over such business vested by the constitution and charter in the city government is not involved in this case. The use of the term "permit" in the charter is of no significance in the case at bar except in so far as it describes the character of business he is conducting. What is said in the main opinion concerning the propriety of requiring a permit and vesting the power to grant or withhold the same in the sound discretion of some municipal officer or body is immaterial. It is for that reason that I do not concur in the main opinion. The rules with reference to the authority of municipalities to grant or withhold permits are thoroughly established in this state and need not be discussed. I do not think that under these rules the arbitrary power to grant or withhold permits for the conduct of the business of a second-hand bookstore can exist. As the point is not involved in the case, and the law is well settled, I deem it unnecessary to say more upon this subject, and have only said this much in order to indicate my reason for not fully concurring in the main opinion.

[S. F. No. 9324. In Bank.—December 28, 1921.]

**THE UTAH CONSTRUCTION COMPANY (a Corporation), Appellant, v. FRIEND WILLIAM RICHARDSON, as Treasurer, etc., Respondent.**

- [1] **TAXATION—CORPORATE FRANCHISES—METHOD OF VALUATION—DISCRETION OF BOARD OF EQUALIZATION—CONSTITUTIONAL LAW.**—Under section 14 of article XIII of the constitution, requiring that all franchises, other than those expressly provided for in the section, shall be assessed “in the manner to be provided by law,” it was permissible for the legislature to commit to the board of equalization the duty of selecting the mode of ascertaining the cash value of the different elements dealt with in determining corporate excess instead of requiring the board to compute assessments according to a value-finding rule prescribed by the legislature.
- [2] **ID.—ASSESSMENT BOARDS—PERFORMANCE OF OFFICIAL DUTY—PRESUMPTION.**—It is a rule applicable to assessors and to boards having assessing powers that it is presumed that the assessing officers have properly performed the duties entrusted to them, and, consequently, that their assessments are both regularly and correctly made.
- [3] **ID.—RECOVERY OF FRANCHISE TAXES—BASIS OF TAXATION—BURDEN OF PROOF.**—In an action to recover corporation franchise taxes paid to the state under protest, the burden is upon the plaintiff to prove its contention that the taxes were not based on the valuation of the franchise.
- [4] **ID.—EXCESSIVE TAXES—REVIEW.**—In the absence of evidence that assessments were fraudulently or mistakenly made, or that an improper method of valuation was pursued, consideration cannot be given to a claim that the taxes were excessive.

APPEALS from judgments of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge. Affirmed.

The facts are stated in the opinion of the court.

B. M. Aikins for Appellant.

U. S. Webb, Attorney-General, and Frank L. Guarena, Deputy Attorney-General, for Respondent.

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1. Taxation of corporate franchise in the United States, note, 57 L. R. A. 33.

LENNON, J.—The Utah Construction Company, a corporation organized under the laws of the state of Utah and transacting business in Utah, California, and elsewhere, appeals from judgments rendered against it in two actions instituted by the said corporation against the treasurer of the state of California for the recovery of taxes paid to the state under protest in the fiscal years 1914–15 and 1915–16. The taxes were paid pursuant to assessments made by the state board of equalization and are respectively \$4,000 and \$2,268 in amount. With the exception of dates and figures, the pleadings, evidence, and findings in the two cases are practically the same, and by stipulation the evidence and judgment-roll in both cases are before this court in a single transcript.

Section 14 of article XIII of the state constitution, pertaining to taxation, is a new section, adopted in November, 1910. The pertinent portion of this section reads as follows: “(d) All franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, *in the manner to be provided by law*, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the state.” (Italics ours.) The italicized words afford the basis for the attack in the instant case, for appellant contends that legislative regulation of the manner of making an assessment is a prerequisite to a valid assessment when the constitution requires such legislation (*McHenry v. Downer*, 116 Cal. 20, [45 L. R. A. 737, 47 Pac. 779]), that the legislature failed to prescribe the manner in which franchises were to be assessed and, therefore, that the state board of equalization was without authority to assess appellant’s franchise. Whether or not there has been a compliance with the constitutional requirement in this respect is the first question for consideration.

[1] In a statute expressly enacted for the purpose of carrying into effect the provisions of section 14, article XIII, of the state constitution, the legislature has, among other things, provided for the furnishing to the state board of equalization of information deemed important in ascertaining the value of franchises, that the board shall determine the value of the franchises from the information thus supplied and that the apportionment of taxes shall be based

upon the value obtained. (Stats. 1911, pp. 530, 541.) Consequently, in so far as the prescribing of the "manner" in which assessments are to be made imports the regulation of details of administration, the legislature has left little to be desired in its compliance with the constitutional mandate that such administrative machinery for making assessments be provided by law. Therefore, appellant necessarily takes the position that the expression quoted from the constitution refers not only to the general procedure for assessing franchises, but that the term "manner" also signifies the rule to be followed by the board in determining the value of the franchises, or, in other words, that the constitution places upon the legislature the duty of specifying the weight to be accorded the various facts required to be reported and the mathematical process to be adopted by the board in arriving at a valuation of a franchise from the information before it.

In this connection it must be noted that this court held, in the case of *Miller & Lux v. Richardson*, 182 Cal. 115, 127, [187 Pac. 411], that, "when the constitution in article XIII, section 14, subdivision (d), provides for the assessment and taxation of corporate franchises, it means the so-called corporate excess, although such is not the usual, nor, strictly speaking, a proper, use of the word 'franchise.'" "Corporate excess" is defined in the case cited as "the difference between the value of its [the corporation's] outstanding stocks and bonds as determined by market quotations, the earnings of the company, or otherwise, and the value of its tangible or physical properties. The theory is that the value of the company's outstanding stocks and bonds represents the value of its total assets, so that the difference between this total and the value of the company's physical properties represents the value of the company's intangible assets, and an assessment of the corporate excess, that is, of this difference, is an assessment of all the company's so-called intangibles." (*Miller & Lux v. Richardson*, 182 Cal. 115, 117, [187 Pac. 411].) It follows from this decision that, by the very use of the word "franchises," the constitution itself dictates, in a measure, the process to be pursued by the board of equalization in estimating the value of the property to be taxed. The constitution itself further provides that the franchises shall be taxed at their *actual cash* value. The scope of appellant's attack is, therefore, confined to the single point

that the legislature has failed to select and prescribe a particular rule for appraising the total assets and the tangible property of the corporations, items which must be considered in ascertaining the "corporate excess."

The legislature has provided for the filing by the owner or holder of every taxable franchise of a written report containing detailed information concerning capital stock, bonds, debts, property, and other matters which the legislature evidently regarded as essential to a proper assessment of the value of franchises. (Stats. 1911, pp. 530, 541.) No attempt was made to direct the board of equalization as to how it should employ such information in arriving at the value of the total assets and tangible property of the corporations; the selection of the method calculated to lead to the most accurate valuation was left to the discretion of the said board. As a general rule, it is not essential that the legislature prescribe the method of valuation to be employed, but it may delegate to its taxing officers the power to adopt a suitable method and, in the latter case, the assessors must value the property according to their best judgment and with honest purpose. (*Western Union Tel. Co. v. Missouri*, 190 U. S. 412, 425, [47 L. Ed. 1116, 23 Sup. Ct. Rep. 730, 733, see, also, Rose's U. S. Notes]; *Mexican Petroleum Corp. v. Bliss* (R. I.), 110 Atl. 867, 871; 1 Cooley on Taxation, 3d ed., p. 754.) The general requirement in the state constitution that the legislature fix the "manner" in which the assessment is to be made does not limit the power of the legislature to invest the taxing board with the right to choose a rule of valuation. This question was passed upon in *State v. Wells Fargo & Co.*, 38 Nev. 505, [150 Pac. 836], where the state constitution provided: "The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory . . . ." The court said: "It is further contended, however, that the legislature has failed to adopt any rule or regulation governing the manner of determining the value of the intangible property of the appellant corporation, and without such rule or regulation having been prescribed by the legislature, the revenue officers of the state are unauthorized to make an assessment. We think this objection sufficiently answered by the decision of this court



in *State v. Central Pac. R. R. Co.*, 10 Nev. 47, 63. This court, speaking through Beatty, J., said: 'No principle of valuation of property for purposes of taxation is prescribed by the laws of this state. The statutes define the different species of property, and provide that every species shall be assessed at its "actual cash value." But, as to the mode of ascertaining the cash value, our law is silent. No subsidiary principles of valuation are laid down to guide the owner in making his statement in those cases where he is required to specify values; and the assessor is left equally unrestricted in making his estimates. It follows that owners and assessors must be guided by those general principles which everywhere determine the valuation of property, independently of statutory rules.' " In *Commercial Electric L. & P. Co. v. Judson*, 21 Wash. 49, [57 L. R. A. 78, 56 Pac. 829], it was held that the taxing authorities had power to assess property in the absence of the adoption of any rule of valuation by the legislature, although the constitution required that property "shall be taxed in proportion to its value to be ascertained as provided by law." Bearing in mind that these holdings were under state constitutions which required that the legislature "shall prescribe such regulations as shall secure a just valuation" or that the "value" is "to be ascertained as provided by law," there can be no doubt that under the less specific provision of our own constitution to the effect that the assessment shall be made "in the manner to be provided by law," it was permissible for the legislature to commit to the board of equalization the duty of selecting the mode of ascertaining the cash value of the different elements dealt with in determining corporate excess instead of requiring the board to compute assessments according to a value-finding rule prescribed by the legislature.

Appellant next contends that the proceedings whereby the taxes in question were imposed were void for the reason that there was no assessment, that is, no actual valuation, of appellant's franchise. It is claimed that, instead of ascertaining the cash value of the franchise from the data before it, the board of equalization first estimated the amount of the tax which the members considered the corporation should pay and then some clerk figured out an assessment which would yield a tax equal to the desired amount. This contention is based upon the testimony of the secretary of the

board of equalization to the effect that the members of the board determine the amount of the tax and indorse this on the back of the corporation's franchise tax return and that afterward some clerk "will figure the assessment, whatever it may be, from the tax." The secretary further testified, however, that he was seldom present when the members of the board were assessing franchises and that he was not present when appellant's franchise was assessed in 1914. There was no evidence as to whether or not he was present at the 1915 assessment. Only one person who was present when the franchise was assessed was called as a witness. He was a member of the board and not a single question was asked of him as to what method the board had followed in fixing the amount of the tax or as to whether or not the franchise had been valued by the board and the amount of the tax determined in accordance with the value thus arrived at. He was questioned merely as to what evidence was before the board when the assessments were made, and he testified that the board had before it appellant's franchise tax returns. Nowhere in the record is there any evidence concerning the method followed by the board in arriving at the amount of the tax.

[2] It is a rule applicable to assessors and to boards having assessing powers that it is presumed that the assessing officers have properly performed the duties entrusted to them and, consequently, that their assessments are both regularly and correctly made. (Code Civ. Proc., sec. 1963, subd. 15; *Reclamation Dist. v. Wilcox*, 75 Cal. 443, [17 Pac. 241]; *In re Oklahoma G. & E. Co.* (Okl.), 171 Pac. 26.) The secretary was not present when the 1914 assessment was made and, in all probability, was absent when the franchise was assessed in 1915. Moreover, even conceding that he was qualified to testify as to what was done by the board, he did not testify as to the manner in which the board arrived at the "amount of tax," which was indorsed on the franchise tax returns, and it must, therefore, be presumed that the board determined this amount in the only legitimate way, that is, by first ascertaining the value of the franchise. Nor does this interpretation of the testimony fail to account for the fact that it was customary for a clerk to figure the assessment from the amount of the tax, for the board may have adopted this means of verifying or checking up its own

calculations in computing the amount of the tax upon the assessed value of the franchise. [3] At any rate, the state was not required to prove that the board did, in fact, base the tax upon the value of the franchise; the burden of showing the contrary rested upon appellant, and the only evidence adduced in this connection, namely, the testimony of the secretary of the board, was too indefinite and unsubstantial to overcome the presumption that the board had properly performed its official duties.

[4] Inasmuch as there is not a particle of evidence that the assessments were fraudulently or mistakenly made, or that an improper method of valuation was pursued, we cannot consider appellant's complaint that the taxes were excessive. (*Miller & Lux v. Richardson*, 182 Cal. 115, 128, [187 Pac. 411].)

The judgments are affirmed.

Wilbur, J., Sloane, J., Shurtleff, J., Richards, J., *pro tem.*, Waste, J., and Shaw, C. J., concurred.

Rehearing denied.

All the Justices concurred.

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[S. F. No. 9441. In Bank.—January 3, 1922.]

HARRY T. BLACKWOOD, Respondent, v. J. H. McCALLUM et al., Appellants.

[1] SURETIES — RECOVERY ON CONTRACTOR'S BOND — PLEADING — PERFORMANCE BY OWNER.—In an action by an owner against the sureties on the bond of a building contractor for breach of the condition of the bond that the sureties would pay all liens placed upon the property arising from the performance of the work or the furnishing of materials in connection therewith, it is not necessary for the plaintiff to allege that he had performed the contract upon his part, since the undertaking was that the contractor and not the owner would perform.

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1. Effect of stipulation in building contract that alterations or extras must be ordered in writing, notes, *Ann. Cas.* 1915D, 758; 48 L. R. A. (N. S.) 564.

- [2] **ID.—MODIFICATION OF CONTRACT—INSUFFICIENCY OF ANSWER.**—In an action by an owner against the sureties on a building contractor's bond to recover money paid to lien claimants to protect the property from execution sale, an averment in the answer that the building was erected in accordance with, and pursuant to, a new and different contract from that for the faithful performance of which the defendants became sureties is not the statement of an ultimate fact, but of a conclusion of law.
- [3] **ID.—CHANGES IN CONTRACT—DEPARTURE FROM PRESCRIBED METHOD — PROVISION OF BOND — SURETIES NOT EXONERATED.**—While an owner and a building contractor may, as between themselves, waive the method prescribed by the contract for making certain changes and alterations in the work, such waiver is not binding on the sureties without their consent, but such consent is shown where the bond provides that such changes and alterations may be made without their consent and that they shall not be released from liability thereby.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

J. W. Henderson and Hartley F. Peart for Appellant.

Wright & Wright & Stetson for Respondent.

**SHURTLEFF, J.**—This is an appeal by the defendants, J. H. McCallum and E. O. Benner, from a judgment against them and their codefendant, Hansbrough-Johnson Company, the latter not joining in the appeal.

The complaint alleges that on June 5, 1916, the plaintiff, as owner, entered into a building contract with the defendant Hansbrough-Johnson Company, whereby the latter agreed, for the price of \$9,712, to erect for plaintiff a two-story frame residence upon a lot of land in San Francisco; that to secure the performance of said contract the Hansbrough-Johnson Company, as principal, and the appellants McCallum and Benner, as sureties, executed and delivered to plaintiff a bond in the penal sum of \$4,856, conditioned that said Hansbrough-Johnson Company would in all respects comply with all the terms, covenants, and conditions of said contract and furnish the materials and perform the work according thereto, free of liens or claims arising out

of materials furnished or work performed thereunder; that said bond further stipulated that, in the event of any liens being filed upon the building or land upon which it was erected, arising from the performance of the work or furnishing of the materials, or in the event of plaintiff being compelled to pay any sums of money, for said work or materials, by reason of the failure of Hansbrough-Johnson Company to pay the same, then the said McCallum and Benner would repay plaintiff said sums, not exceeding the amount of the bond; that said building was completed on or prior to September 18, 1916, and that on said last-mentioned day notice of completion and acceptance was filed for record in the office of the county recorder of the city and county of San Francisco (this date is evidently a clerical error and should be December 15, 1916); that on January 17, 1917, two claims of lien against the building and land for materials furnished and used in the construction of said building were filed for record and actions were commenced to foreclose them; that in each of these actions the plaintiff and Hansbrough-Johnson Company were named as defendants and were respectively served with the summons and a copy of the complaint in each of them; that the plaintiff appeared and answered in each action; that Hansbrough-Johnson Company made no appearance in either of said actions; that the actions were consolidated and tried; judgments rendered in favor of the claimants, the liens foreclosed and the property ordered sold; that plaintiff was compelled to pay \$250 for the services of attorneys in defending said actions; that prior to the commencement of said actions to foreclose said liens plaintiff had paid the defendant Hansbrough-Johnson Company all sums due and owing by him to said company for the work, labor, and materials furnished by it in the construction of said building, "save and except the sum of \$746.30, which sum constituted a fund in plaintiff's possession applicable to the payment *pro tanto* of said "final" judgments; that on December 4, 1918, in order to protect said building and property from an execution sale, plaintiff paid said judgments in full, amounting to \$2,846.49, for which amount, and the said sum paid for the services of attorneys, less said \$746.30, plaintiff asked judgment against the defendants.

The appellants did not demur to the complaint, but answered, admitting, either expressly or by failure to deny the same, all the allegations of the complaint, except the following: Denied that the building was completed in accordance with said contract, but alleged that it was completed by said company in accordance with and pursuant to a new and different contract with plaintiff; denied that there is anything due or owing on account of the payment of said judgment or on any other account; denied that said \$746.30 constitutes a fund in plaintiff's possession for the purposes alleged in the complaint. The answer contains the further denial that the company completed the building "on the eighteenth day of September, 1916," which is, in effect, an admission that it was completed upon some other date.

When plaintiff rested, the appellants moved for a nonsuit upon the ground that the building was not completed in accordance with the contract for the faithful performance of which they became sureties, but in accordance with or pursuant to a new and different agreement made between the plaintiff and the Hansbrough-Johnson Company, which motion was denied, and we think properly so.

The court found upon all the issues raised by the answer as follows: That the building was completed on December 15, 1916, and "was not constructed or completed in accordance with or pursuant to a new contract with plaintiff, nor a contract different from the one of June 5, 1916, set forth in said complaint"; that there is due and owing from the defendants, J. H. McCallum and E. O. Benner, and each of them, on account of the payment of the judgments referred to in plaintiff's complaint, after crediting said sum of \$746.30 thereon, a balance of \$2,100.19 and interest. For these amounts, together with the said sum of \$250, paid for attorney's fees, as alleged and not denied, judgment was ordered and entered in favor of plaintiff, in accordance with the findings and conclusions of law.

Defendants raise the point in this court, and for the first time, that the complaint fails to state a cause of action in that it does not allege, either by setting forth the facts showing the same or in the manner permitted by the code (sec. 457, Code Civ. Proc.), that plaintiff has duly kept and performed the covenants and stipulations of the building con-

tract which by its terms are to be kept and performed by him, and which performance appellant claims must be established in order for plaintiff to successfully maintain the action.

[1] But in order to fasten *prima facie* liability upon the defendants' sureties under their bond, it was not essential for plaintiff to allege that he had performed the contract upon his part. Their undertaking was that Hansbrough-Johnson Company, not the plaintiff, would perform the agreement. Furthermore, they by the express terms of their bond agreed to pay all liens placed upon plaintiff's property arising from the performance of the work or the furnishing of materials in connection therewith, and it is the alleged breach of this condition that forms the foundation of the complaint and which breach we think is sufficiently pleaded to state a cause of action. If plaintiff was guilty of any act which would release, in whole or in part, the appellants' obligation as sureties, it was an affirmative defense to be specially pleaded by them, which was not done.

The answer wholly failed to plead any facts showing that the original contract had been modified in a material or in any respect. It did, however, attempt to allege a new contract, but was fatally defective in that regard.

[2] The averment that the building was erected "in accordance with and pursuant to a new and different contract or agreement with plaintiff," which is all the answer contains upon the subject, is not the statement of ultimate fact but of a conclusion of law. Moreover, if treated as an allegation of fact, there is no evidence to support it. If appellants claimed that a different contract had been entered into between plaintiff and their principal, they should have stated its covenants and conditions with sufficient particularity and detail to acquaint plaintiff with its terms, which we have seen they omitted to do. The contract is not pleaded either in the complaint or answer, nor do the findings set it out or state its effect, nor was there any defense pleaded based on premature payments, from which it follows that these questions were not in the case—they were not presented by the pleadings. In short, the appellants made no adequate attempt in their answer to bring themselves within the provisions of sections 2819 and 2840 of the Civil Code, or to show any exoneration



by reason of the suspension or impairment of their remedies or rights against Hansbrough-Johnson Company, and their case cannot be "better proven than alleged."

[3] Appellants make the further contention that certain extra work claimed to have been performed by the Hansbrough-Johnson Company was not "added to the contract" in the method by it prescribed, and that such departure exonerated them, but the pleadings present no such issue, and, in any event, the claim is without merit. The contract provided that the owner or architect could request changes, alterations, or deviations in or omissions from the contract or plans or specifications, and that it should not render it void, and that the rule of practice to be observed in accomplishing such changes and modifications should be that they "be agreed upon and fixed in writing, signed by the owner and the contractor, prior to execution," which in some instances, as appellants claim, was not done here. The contract further declared that "No such change or modification shall release or exonerate any surety or sureties upon any guaranty or bond given in connection with this contract." The foregoing provisions could have been waived, as between the plaintiff and the Hansbrough-Johnson Company, which was the case where modifications were made without first agreeing upon them in writing, but they could not bind the appellants by such waiver without their consent, and the consent is found in the bond, and is as follows: "and their [sureties] written consent must be secured to any change or alterations made in the original drawings or specifications by the said obligee costing in excess [of] one thousand dollars, but any change in the original drawings or specifications involving decreased expenditure on the said contract or an increased expenditure therein of less than one thousand dollars, or not involving any change in cost, may be made without the consent of the sureties and shall not release the sureties from liability hereunder."

The case was tried and decided upon the pleadings as framed and the evidence supports the findings.

Judgment affirmed.

Shaw, C. J., Wilbur, J., Sloane, J., and Lennon, J., concurred.

[S. F. No. 9951. In Bank.—January 4, 1922.]

C. S. HOUGHTON, Petitioner, v. SUPERIOR COURT OF  
ALAMEDA COUNTY et al., Respondents.

[1] TRIAL—CONTINUANCE—PENDENCY OF APPEAL—VALIDITY OF JUDGMENT—DISCRETION.—Where the trial of an action involves the consideration of a previous judgment rendered between the parties to the action, which, if final, would be *res adjudicata* on some or all of the issues involved in the trial, the trial court in the exercise of a sound discretion may continue the trial of the case until the final adjudication of the matter in the other action.

APPLICATION for a Writ of Mandamus to compel the Superior Court to proceed with the trial of an action. Denied.

The facts are stated in the opinion of the court.

Courtney L. Moore for Petitioner.

Fitzgerald, Abbott & Beardsley for Respondents.

WILBUR, J.—The petitioner seeks a writ of *mandamus* to require the respondent Dudley Kinsell, judge of the superior court, to proceed with the trial of an action entitled *C. S. Houghton v. Franklin A. Kales*. That action is one to recover \$2,538.60, the balance due upon a promissory note of F. A. Kales for \$3,538.60. The defendant Kales, by way of setoff, pleads a joint judgment in favor of F. A. Kales and Jasper S. Connell for \$36,230.59, upon which \$8,039.38 has been paid. The case came on for trial March 9, 1921. Thereupon counsel announced that they were ready to proceed.

Upon the trial it was stipulated that no part of the promissory note sued upon by the plaintiff had been paid except the sum of one thousand dollars. This stipulation in the absence of any setoff would entitle the plaintiff to a judgment for the full amount claimed. Thereupon the defendant offered in evidence the judgment pleaded as a setoff. Plaintiff objected to the introduction of this judgment on the ground that it was not a final judgment, and the court sustained said objection on the ground that an appeal from

said judgment was then pending and undetermined. Thereupon the defendant moved for a continuance of the trial, pending the final decision of the case on appeal, upon the ground that the judgment pleaded as a setoff is not final because an appeal is pending therefrom and because the plaintiff objects to the introduction of the judgment or the consideration of it as a setoff while the appeal is pending. The plaintiff objected to the continuance upon the ground that at the time of the filing of the action and at the time of the trial the defendant had no defense and that the court is without jurisdiction to grant the continuance. The lower court thereupon granted the motion and continued the trial until June 6, 1921, at 10 o'clock A. M. On June 6, 1921, and thereafter from time to time, the trial has been continued over the objection of the plaintiff pending the determination of the appeal.

The petitioner, therefore, seeks a writ of mandate to compel the trial court to proceed with the trial and thus enable him to secure a judgment for \$2,538.60, together with interest at six per cent from June 21, 1916, against the defendant, who holds a judgment for nearly ten times that much against him. It is obvious that the action of the trial court was in furtherance of justice and the proper exercise of discretion, if authorized by law. The action of the trial court is amply sustained by authority. In the case of *Smith v. Jones*, 128 Cal. 14, [60 Pac. 466], a petition for writ of *mandamus* was sought in this court to compel a judge of the superior court to render judgment in an ejectment suit. The defendant in that case pleaded the rendition of a prior judgment between the same parties wherein said defendant was adjudged the owner of the premises; that an appeal had been taken from the judgment and remained undetermined. Upon the trial of that action plaintiffs had offered evidence in support of their complaint and demanded judgment according to the prayer of their complaint, but the defendant asked that the cause be stayed until the judgment pleaded in his answer should become final. The motion was granted, the submission of the case set aside, and all proceedings stayed until the further order of the court. In determining the matter this court in Bank said:

“The jurisdiction of the trial court in a case like the one recited is unquestioned, and the power of the court in a

proper case to set aside a submission and postpone final determination is also unquestioned. Many cases may be supposed wherein it would not only be the right of the judge to do so, but it would be his duty in the interest of justice and to promote the substantial rights of the parties. To justify this court in interfering with and controlling the action of the trial courts in proceedings of this nature it would require a clear showing that the act complained of was an abuse of discretion. In this case no such showing has been made; on the contrary, from an inspection of the petition and the return thereto, it would appear that the order of the court complained of, under the circumstances, was one very proper to be made."

In the case of *Brown v. Campbell*, 100 Cal. 635, [38 Am. St. Rep. 314, 35 Pac. 433], the court in Bank had under consideration an action to recover from trustees a surplus in the hands of such trustees derived from the sale of certain real property and being the balance due after satisfying the indebtedness for which the trust deed was given. The amount was claimed both by plaintiff, the record owner of the property, and by one Priest, who based his claim upon a judgment in an attachment suit against Joseph Brown and the claim that the conveyance from Joseph Brown to A. M. Brown, the plaintiff, of the attached property was in fraud of creditors. Plaintiff, A. M. Brown, pleaded in bar of the right of the defendant Priest a judgment rendered November 24, 1888, in an action wherein Priest was plaintiff and Brown defendant, wherein it was adjudged that the conveyance made by Joseph Brown to A. M. Brown was not made with intent to hinder, delay, or defraud creditors. The defendant pleaded the pendency of that action in abatement. The latter plea was stricken out on plaintiff's motion.

In ruling on the questions thus presented the court in Bank stated:

"That judgment was not a bar to the matters alleged in the defendant's answer as a defense, nor to the same matters set out in the cross-complaint, and upon which he demanded the relief given him by the court below. It had not become final when the cross-complaint was filed, nor yet when the action was tried, and the doctrine of *res adjudicata* only applies to final judgments. The time to appeal from the judgment of November 24, 1888, had not expired when the

cross-complaint was filed, and, although no appeal had been taken therefrom, the action was still pending within the legal meaning of that term (Code Civ. Proc., sec. 1049), and the judgment was not a bar to a retrial of the matters alleged in the cross-complaint, under the rule announced by this court in *Harris v. Barnhart*, 97 Cal. 546, [32 Pac. 589]; *Naftzger v. Gregg*, 99 Cal. 83, [37 Am. St. Rep. 23, 33 Pac. 757]; *Estate of Blythe*, 99 Cal. 472, [34 Pac. 108].

“But, while the judgment in *Priest v. Brown et al.* was not for the reason stated a bar to the cause of action alleged in the cross-complaint, still the pendency of that action would have been good ground for the continuance of this until the final determination of the former action, or would have been a sufficient basis for an order dismissing the present action upon motion of the plaintiff, notwithstanding the affirmative relief demanded by the defendant Priest in his cross-complaint, and the refusal of the court to have granted either of such motions would, perhaps, have been erroneous; but no such motion was made by the plaintiff, and the trial proceeded without objection, the plaintiff still insisting upon the judgment in *Priest v. Brown et al.* as an estoppel, and as ground for a judgment in his favor. Under these circumstances we cannot say that the court erred in proceeding to the trial, although it might well have continued the case of its own motion until the final determination of the former action.”

It will be observed that the judgment in the former action was pleaded by one side as a bar and by the other in abatement. The court proceeded to render final judgment in favor of Priest, who had pleaded the judgment in abatement, consequently the failure to abate the action on his plea was not prejudicial to him, so that the question considered on appeal was the duty of the trial court with reference to the plea of the judgment in bar, and it is suggested that, although the plaintiff did not request a continuance, the court might well have continued the case of its own motion. The same day that the supreme court affirmed the judgment in *Brown v. Campbell*, it also affirmed the judgment in *Priest v. Brown*, 100 Cal. 626, [35 Pac. 323], thus, in one day affirming a judgment holding that a conveyance from A. M. Brown to Joseph Brown was fraudulent and void (*Brown v. Campbell, supra*) and a judgment that it was

valid. (*Brown v. Priest, supra*). Upon the going down of the *remittiturs* in these two cases, Brown moved for an order setting aside the judgment and granting a perpetual stay of execution upon the theory that the first judgment rendered, that in the case of *Priest v. Brown, supra*, should control. The supreme court, in Department One, in passing upon this claim (*Brown v. Campbell*, 110 Cal. 644, [43 Pac. 12]), held that because of the failure of the plaintiff Brown to secure a continuance of the case of *Brown v. Campbell, supra*, and because of preventing Priest from securing a judgment in abatement by having that defense stricken out of his answer, he could not have the relief asked, but was bound by the judgment in *Brown v. Campbell, supra*.

From the foregoing decisions it is clear that a judgment which would be *res adjudicata* of matters involved in an action may be availed of during the pendency of an appeal from such judgment, either by a plea in abatement upon proof of which a judgment may be rendered that the action abate (*Connor v. Bank of Bakersfield*, 174 Cal. 400, [163 Pac. 353]), or by a continuance of a second action until the result of the appeal has been determined (*Brown v. Campbell, supra*, and *Smith v. Jones, supra*).

The petitioner here relies upon the case of *Dunphy v. Belden*, 57 Cal. 427. In that case a writ of *mandamus* was sought to compel the trial of the issues in a case then pending in the superior court. The court there said: "... it appears that the issues awaiting trial in the court below have been formed in a new and independent action, to the complaint in which a plea of the pendency of another action has been interposed. It will be observed that it is no part of our duty now to decide whether or not the plea is maintainable." Upon the authority of *Avery v. Superior Court*, 57 Cal. 247, it was held that the trial court had no power or discretion to refuse to try the action until the conclusion of the action pending. Justices Thornton and Morrison dissented, saying: "Certainly the court below is invested with the discretion to postpone the trial of the cause last named until the former appeal is determined in this court, thus saving expense to the parties. If the party appealing should fail to bring on the hearing on this appeal within a reasonable time, the court would and should proceed to hear the cause, and no doubt would do so. The order of the court below merely

postpones the hearing of the cause, but it is in the power of the court to order a trial at any time, and no doubt it would do so on a showing of facts indicating such a course to be proper."

It thus appears that the court was divided as to whether it was the duty of the trial court to proceed and determine the plea in abatement as held by the majority or whether the case might be continued until the determination of the action thus pleaded in abatement, as held by the minority. The decision of the majority of the court in *Dunphy v. Belden, supra*, is in effect overruled by the case of *Smith v. Jones, supra*, decided by the court in Bank in March, 1900, for there the action of the trial court in continuing the case rather than rendering a judgment of abatement was approved and a writ of *mandamus* refused. [1] In any event, we now expressly overrule the case of *Dunphy v. Belden, supra*, and hold that where the trial of an action involves the consideration of a previous judgment rendered between the parties to the action, which, if final, would be *res adjudicata* on some or all of the issues involved in the trial, that the trial court in the exercise of a sound discretion may continue the trial of the case until the final adjudication of the matter in the other action. It follows that the respondent in this case was justified in its order postponing the trial of the action of *Houghton v. Kales* until the determination of the former action on appeal, for if the judgment in the former action is affirmed on appeal and is a proper set-off, it would follow that the plaintiff is not entitled to the judgment which he seeks to secure by forcing this action to judgment before that appeal can be determined.

Writ denied.

Richards, J., *pro tem.*, Waste, J., Shaw, C. J., and Lennon, J., concurred.

SLOANE, J., Concurring.—I concur in the decision, although I am of the opinion that the trial court was in error in excluding the judgment pleaded by defendant as a setoff and should have admitted it in evidence and proceeded with the trial, since, although an appeal had been taken from the judgment, no stay bond had been filed, and, under section 942 of the Code of Civil Procedure, the judgment continued



in effect for all purposes of its enforcement, and defendant had a right to use it as a setoff against the plaintiff's claim (*Dowdell v. Carpy*, 137 Cal. 33, [70 Pac. 167]; *Sewell v. Price*, 164 Cal. 265, [128 Pac. 407]). However, as it was excluded from evidence upon petitioner's objection that it had not become final, he is not in a position to protest a postponement of the trial to await the determination of the appeal.

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[S. F. No. 9277. In Bank.—January 4, 1922.]

ELI E. PITMAN, Appellant, v. AGNES J. WALKER,  
Respondent.

- [1] CORPORATIONS—WRONGFUL ACTS OF AGENTS—IMPUTED NOTICE—APPLICABILITY OF RULE TO OFFICERS.—While a corporation is bound by the unlawful or fraudulent acts of its agents within the scope of their employment and notice of such wrongful acts is imputed to the corporation, the rule does not extend to the imputing of such notice to an officer of the corporation without actual notice or connection with the transaction, and in matters affecting his private and independent dealings with the corporation.
- [2] ID.—SALE OF STOCK—UNDISCLOSED REPRESENTATIONS OF AGENT—INAPPLICABILITY OF RULE.—The doctrine of imputed notice of the unlawful and fraudulent acts of the agents of a corporation cannot be fairly applied to a director of a business corporation with relation to undisclosed representations of an agent of the corporation in the sale of its stock.
- [3] MORTGAGE—ASSIGNMENT OF INTEREST IN ESTATE—SECURITY FOR NOTE.—An assignment of an interest in the estate of a deceased person as security for the payment of a promissory note is a mortgage under section 2924 of the Civil Code and passes to the assignee of the note without formal assignment under the provisions of section 2936 of such code.
- [4] ID.—NOTE AND CONTEMPORANEOUS MORTGAGE—PURCHASER WITH NOTICE—DESTRUCTION OF NEGOTIABILITY.—Mortgage security oper-

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1. Corporation's knowledge as imputable to officer thereof, note, Ann. Cas. 1915A, 855.

Whether officer or employee of corporation is chargeable with its knowledge of infirmities in commercial paper purchased from it, notes, 48 L. R. A. (N. S.) 65; L. R. A. 1915D, 1099.

4. Provisions in mortgage securing note as affecting negotiability, notes, Ann. Cas. 1916C, 503; Ann. Cas. 1912D, 1.

ates to destroy the negotiability of a promissory note in the hands of a purchaser with notice thereof, if the mortgage is executed contemporaneously with the note, as part of the same transaction.

[5] **ID.—NOTE AND SUBSEQUENT MORTGAGE—PURCHASER WITH NOTICE—NEGOTIABILITY.**—Where a promissory note was negotiable as originally executed, but subsequently mortgage security was demanded and given, such note is negotiable in the hands of a subsequent purchaser with notice of the security in so far as the maker is prohibited from setting up the defenses of fraud or failure of consideration, but the holder is bound by all the restrictions which section 726 of the Code of Civil Procedure places upon actions to collect a debt secured by mortgage.

**APPEAL** from a judgment of the Superior Court of Fresno County. D. A. Cashin, Judge. Reversed.

The facts are stated in the opinion of the court.

Short, Lindsay & Woolley, Carl E. Lindsay, C. O. Hansen and F. W. Docker for Appellant.

M. K. Harris and Geo. Cosgrave for Respondent.

**SLOANE, J.**—The plaintiff has appealed from a judgment in favor of the defendant in an action to recover five thousand dollars on a promissory note.

The note was executed by the defendant to the Boden Automatic Hammer Company, a corporation, in consideration for the purchase price of certain shares of the capital stock of the corporation, and was assigned to the plaintiff before maturity and for a valuable consideration. While the note was negotiable in form, it was assigned to plaintiff with security from the maker given after the execution of the note, but prior to the assignment, and consisting of an equitable mortgage upon the maker's interest in the estate of her deceased husband. It was claimed that, by reason of such security, the negotiability of the instrument had been destroyed and that the plaintiff took it subject to any defenses existing against the original payee.

The defenses pleaded were that there had been a failure of consideration in that the stock of the corporation received therefor was without value, and that the defendant had been induced to purchase the same and execute said note therefor by false and fraudulent representations; and that said sale

of stock was void under the "blue sky" law by reason of the fact that no certificate or permit of the commissioner of corporations had been exhibited to defendant before the purchase of said stock and execution of said note therefor, as required by law.

The primary question to be determined is whether or not these affirmative defenses are available to the defendant; and this depends upon whether or not the note was negotiable, and the plaintiff a purchaser in due course.

That the note was negotiable in form, and was assigned for value and before maturity, is beyond dispute. Respondent contends, however, that the assignment was taken by plaintiff with notice of defendant's equities, or at least under circumstances imputing notice sufficient to put the purchaser on inquiry. Plaintiff was at all times covered by the transaction a stockholder, director, and vice-president of the corporation, named as payee in the note. He was aware that the note was given on the purchase of the corporate stock. He knew that defendant had made a previous purchase of five thousand shares of the stock and had paid three thousand dollars of the purchase price. She had, subsequent to the purchase, spoken to him about her investment, and asked him if he thought the stock was good. He replied that he thought it was, that he had invested in it himself, which was the fact. He testifies that he had no knowledge prior to taking the assignment of her note that she was dissatisfied; knew nothing of any representations that had been made to induce her to buy stock, and was not aware of any irregularity or failure in exhibiting to her the corporation commissioner's permit, which permit had been duly issued. There is nothing in the evidence in rebuttal of this testimony. The only theory upon which can rest the implied finding from the verdict of the jury in defendant's favor that plaintiff was not a purchaser in good faith and without notice of any infirmities in the note, is that a presumption or inference arises against him from his connection with and general familiarity with the corporate business. To whatever extent this might be the rule as to transactions in the ordinary course of the corporation's business, it would not apply to irregular conduct or fraudulent acts of other corporate agents not actually brought to his attention. The presumption, if any such may be indulged by the officers of

the company, is that the sales agents acted fairly and in accordance with law.

[1] The corporation on familiar principles of law is bound by the unlawful or fraudulent acts of its agents within the scope of their employment, and notice of such wrongful acts is imputed to the corporation, but this rule does not extend to the imputing of such notice to an officer of the corporation without actual notice or connection with the transaction, and in matters affecting his private and independent dealings with the corporation. (*Washburn v. Inter-Mountain Min. Co.*, 56 Or. 578, [Ann. Cas. 1912C, 358, 109 Pac. 382]; *Peckham v. Hendren*, 76 Ind. 47; Cook on Stock and Stockholders, 727; 14A Corpus Juris, 100; *Doane v. King*, 30 Fed. 106; *King v. Doane*, 139 U. S. 166, [35 L. Ed. 84, 11 Sup. Ct. Rep. 465, see, also, Rose's U. S. Notes].)

It has been held that a director or managing officer of a banking corporation may not claim the immunities of a purchaser without notice of the commercial paper of his bank, where the infirmity of the paper appears on the records of the corporation or arises within the scope of the officer's employment. (*McCarty v. Kepreta*, 24 N. D. 395, [139 N. W. 992].) This decision, however, rests upon the peculiar provisions of the banking laws, and the fact that the infirmity in the note in question appeared from the records of the bank's business.

[2] Such doctrine of notice cannot be fairly applied to a director of a business corporation with relation to undisclosed representations of an agent of the corporation in the sale of its stock.

It remains to be determined if the note in question is entitled to the privileges of a negotiable instrument.

That it was negotiable at the time of its execution and delivery is conceded. It is claimed, however, that its negotiability was destroyed by the subsequent acts of the parties thereto in demanding and receiving from the maker a mortgage securing its payment.

The facts as disclosed by the evidence are that in the negotiation between the plaintiff and the corporation for the assignment of the note, the former demanded as a condition of the purchase that the corporation obtain from the maker of the note an assignment of her interest in the es-

tate of her deceased husband as security for the note. The estate consisted of real and personal property. This instrument was executed, and assigned in turn to plaintiff, with the note, as a part of the same transaction. It does not appear at what precise date the transfer of the note was made to plaintiff, but it does sufficiently appear from the evidence that the obtaining of this security by the corporation and its assignment to the plaintiff was a condition precedent to his purchase of the note, and as it was executed to the corporation as security for this note, it is to be presumed that it was made while the corporation still owned the note. [3] The instrument creating this security is a mortgage under section 2924 of the Civil Code, and it passed to the assignee of the note even without formal assignment under the provisions of section 2936 of the Civil Code.

The plaintiff, then, purchased this note, not only with notice, but upon the express consideration that it was secured by a mortgage executed by the maker to the original payee.

[4] That such mortgage security would operate to destroy the negotiability of the note in the hands of a purchaser with notice thereof if it had been executed at the time the note was made is the settled law under the decisions of this court. (*National Hardware Co. v. Sherwood*, 165 Cal. 1, [130 Pac. 881]; *Helmer v. Parsons*, 18 Cal. App. 450, [123 Pac. 356]; *Metropolis etc. Bank v. Monnier*, 169 Cal. 592, [147 Pac. 265]; *Anderson v. Wickliffe*, 178 Cal. 120, [172 Pac. 381]; *Crocker Nat. Bank v. Byrne & McDonnell*, 178 Cal. 329, [173 Pac. 752].)

It will be noticed, however, that in every case in which this court has declared the non-negotiability of a note secured by a mortgage, it has been with the qualification that the mortgage is executed contemporaneously with the note as part of the same transaction. In fact, we know of no instance in the decisions where a note duly executed as a negotiable instrument has been held to have lost that quality by a subsequent contract introducing some qualification or limitation which, if originally made part of the note contract, would have destroyed its negotiable character.

The rule as stated by Daniel on Negotiable Instruments is that, although an agreement be written upon the same paper that the note is written on, and yet if it be evident

that it was not intended to incorporate the terms of the agreement within the instrument itself, the transferability and negotiability of the instrument will not be affected by it. (Daniel on Negotiable Instruments, sec. 155; *Odiorne v. Sargent*, 6 N. H. 401; *Ewing v. Clark*, 76 Mo. 545; *American Gas. Co. v. Wood*, 90 Me. 516, [43 L. R. A. 449, 38 Atl. 548]; *Bay v. Shrader*, 50 Miss. 326; 2 Parsons on Bills and Notes, sec. 544; Randolph on Commercial Paper, secs. 190, 191.)

The Negotiable Instrument Act, as adopted in this state in 1917, prior to the execution of this note, provides that: "An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed, or discharged by payment or otherwise." (Stats. 1917, p. 1539, sec. 3128.) This is, however, but the expression of the common-law rule. The doctrine is stated in *Wettlaufer v. Baxter*, 137 Ky. 362, [26 L. R. A. (N. S.) 804, 125 S. W. 741], as follows: "When a paper is started on its journey into the commercial world, it should retain to the end the character given to it in the beginning, and written into its face. If it was intended to be a negotiable instrument and was so written it should so remain. Then everyone who discounts or purchases it will need only to read it to know what it is and what his rights and liabilities are."

The laws distinguishing negotiable from non-negotiable instruments are not based upon any inherent distinctions between the obligations assumed in the one class or the other of such contracts, but upon arbitrary rules established by the law-merchant to create a form of commercial paper that may pass from hand to hand unchallenged by undisclosed defenses. The qualities of negotiability are, therefore, fixed and arbitrary, and cannot be enlarged or extended upon mere considerations of logic or even equity. The negotiable instrument is expected to go through its commercial life with the qualities it is born with and none other.

This does not mean that an instrument negotiable in its origin cannot be limited and modified by subsequent contract between the parties, so as to affect the rights of subsequent holders, but only, however, to the extent that they take the paper with notice of the specific limitation.

For instance, a contemporaneous memorandum on a promissory note authorizing its payment in merchandise, or from

some particular fund, would render the instrument non-negotiable, but such an agreement subsequently attached, while enforceable between the parties and against an indorsee with notice of the limitation, would not open the instrument to other defenses of which the purchaser had no notice.

[5] So, in the instant case, the acceptance of this note by plaintiff, with knowledge that it was secured by mortgage made subsequent to the execution of the note, doubtless binds the plaintiff by all the restrictions which section 726 of the Code of Civil Procedure places upon actions to collect a debt secured by mortgage, and might have barred the action in its present form had it been pleaded, but does not render the note non-negotiable to the extent that the maker may set up defenses of fraud in its procurement, or failure of consideration, of which the assignee has had no notice.

It follows from these conclusions that the note sued on was entitled to all the immunities of a negotiable instrument in the hands of an innocent holder for value, and it is unnecessary to determine whether as between the original parties the transaction was tainted with fraud either by reason of misrepresentations or failure to comply with the Corporate Securities Act.

The judgment is reversed.

Shaw, C. J., Lennon, J., Wilbur, J., and Shurtleff, J., concurred.

Rehearing denied.

All the Justices concurred.



[Sac. No. 3119. In Bank.—January 4, 1922.]

THE SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION COMPANY, INCORPORATED (a Corporation), Appellant, v. W. H. WORSWICK, Jr., et al., Respondents.

[Sac. No. 3120. In Bank.—January 4, 1922.]

MILLER & LUX INCORPORATED (a Corporation), et al., Appellants, v. W. H. WORSWICK, Jr., et al., Respondents.

- [1] **WATERS AND WATER RIGHTS—APPROPRIATIONS—PROTECTION—CONSTRUCTION OF ACTS OF CONGRESS.**—Under the act of Congress of July 26, 1866, and the supplemental act of July 9, 1870, providing that wherever by priority of possession rights to the use of water have vested and accrued, and the same are recognized by the local customs, laws, and the decisions of the courts, the possessors and owners thereof shall be maintained and protected therein, the only rights which are confirmed by such enactments are those recognized by the customs, laws, and decisions of the courts in the particular state in which the appropriation is made and in which the land affected lies.
- [2] **ID.—RIPARIAN RIGHTS—LOWER APPROPRIATOR.**—The rights of a riparian owner in the waters of the abutting stream are not affected by any interference with the waters of the stream made on privately owned land after they pass below the boundaries of such riparian land, and such use below, no matter how long continued, or what may be the nature of the claim of right thereto by the user thereof, in no manner affects the riparian rights pertaining to the land above the place of use and point of diversion.
- [3] **PRESCRIPTION—INVASION OF RIGHT—ESSENTIAL ELEMENT.**—In order to establish a right by prescription, the acts by which it is sought to do so must operate as an invasion of the rights of the party against whom it is set up and afford ground for an action.
- [4] **WATERS AND WATER RIGHTS—LOWER APPROPRIATION—SUPERIORITY OF UPPER RIPARIAN RIGHTS—ACTS OF CONGRESS.**—Inasmuch as neither the local customs, laws, and decisions of the California courts had ever recognized or upheld the doctrine that water rights

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2. Nature of riparian rights and lands to which they attach, notes, 9 Ann. Cas. 1235; Ann. Cas. 1913E, 709; Ann. Cas. 1915C, 1026.

acquired by an appropriation or diversion below on private land would be superior to the riparian rights pertaining to any land above the place of diversion, the conclusion is inevitable that the acts of Congress of 1866 and 1877 neither create such superior rights nor provide for the maintenance or protection thereof.

- [5] **ID.—DIVERSION UPON PUBLIC LAND—SUBSEQUENT PURCHASE OF UPPER GOVERNMENT LAND—SUPERIORITY OF RIGHTS OF LOWER APPROPRIATOR.**—Under the acts of Congress of 1866 and 1870, where a diversion is made on land then belonging to the United States, the right of the appropriator to the water thereby taken is superior to the riparian rights of a subsequent purchaser of land from the United States lying above the point of diversion.
- [6] **PUBLIC LAND—TITLE OF STATE TO SWAMP AND OVERFLOWED LANDS—IDENTIFICATION AND PATENT SUBSEQUENT TO GRANT—RELATION OF TITLE.**—Under the act of Congress of September 28, 1850, granting swamp and overflowed lands to the state, full beneficial enjoyment thereof passed to the state at that time subject only to the contingencies incident to identification, and when the lands were identified and a patent therefor issued to the state on June 10, 1896, the title so transferred related back to the year 1850, and inured to the benefit of the state and its successors in interest for all purposes, as if the legal title had passed at the date of the act.
- [7] **WATERS AND WATER RIGHTS—APPROPRIATIONS—DIVERSION ON SWAMP AND OVERFLOWED LANDS—SUPERIORITY OF RIGHTS OF SUBSEQUENT UPPER RIPARIAN PURCHASERS.**—Where appropriations of water from a river were made in the years 1871 and 1872, and the dams and headgates were situated on tracts of land of the character known as swamp and overflowed lands which were granted by the United States to the state by the act of September 28, 1850, but not patented to the state until June 10, 1896, such appropriations were not superior to the riparian rights of subsequent purchasers of public lands from the United States situated above the place of such diversion, since such swamp and overflowed lands were not at the time of diversion the property of the United States.
- [8] **ID.—DESERT LAND ACT OF 1877—APPROPRIATION OF SURPLUS WATER—LIMITATION TO DESERT LANDS.**—The Desert Land Act of March 3, 1877, providing that the right to the use of water shall depend upon *bona fide* appropriation and that all surplus water over such actual appropriation and use shall remain free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights, applies only to desert lands, and does not apply to all the public lands of the United States, so as to make the rights of appropriators paramount to riparian rights.

- [9] **ID.—QUIETING TITLE—ESTOPPEL OF UPPER RIPARIAN OWNERS—BURDEN OF PROOF.**—In an action to quiet title to water rights by appropriators who had been diverting the water by means of canals and devoting the same to public use for more than forty years, as against upper riparian owners who had permitted the water during the entire period to flow by their own lands without any use thereof, the burden was upon the plaintiffs, in support of their contention that the defendants were estopped, to prove, if material to the estoppel, that they had knowledge, not only of the existence of the canals and the diversion of the water thereby from the river, but also that the same was being devoted to public use, and evidence of extracts from articles published in a newspaper referring to the size of the canal and extent of territory to be irrigated thereby, but not definitely stating the character of the use, was not sufficient to show such knowledge.
- [10] **ID.—PUBLIC USE OF WATER BY LOWER APPROPRIATOR—ACQUIESCENCE BY UPPER RIPARIAN OWNER—ESTOPPEL.**—An upper riparian owner is not estopped from asserting that his title as such owner is paramount to the right of a lower appropriator, by reason of the fact that he permitted the water to flow by his own land without use and to be diverted by the appropriator for public use, since in order to constitute an estoppel of such a character the person sought to be estopped must have failed to do some act which it was within his power to do and the person claiming the estoppel must have relied on such failure to an extent and for such a period that the subsequent doing of such act would cause him injury.
- [11] **ID.—PUBLIC USE—PRESCRIPTIVE RIGHT—UPPER APPROPRIATOR.**—A person, although not a riparian owner, may acquire a prescriptive right as against a public use below by taking water out of the stream above which otherwise would run down to the canals of the public service corporation.

APPEALS from a judgment of the Superior Court of Merced County. E. N. Rector, Judge. Affirmed.

The facts are stated in the opinion of the court.

Edward F. Treadwell and Berkeley B. Blake for Appellants.

Snook & Brown, Chas. E. Snook, George M. Naus and Thos. J. Ledwich for Respondent White & Friant Lumber Co.

R. M. Widney for Respondent John Widney.

Harris & Hayhurst and M. K. Harris for all Respondents, except John Widney and White & Friant Lumber Co.

SHAW, C. J.—In each of the cases above entitled the plaintiff appeals from the judgment. The two cases were begun separately and separate pleadings, findings, and judgment were filed and made in each case. They were, however, tried together in the court below and the two cases are submitted, so far as the plaintiffs are concerned, upon the same briefs. As the questions are, for the most part, identical, they may be treated together.

In case No. 3119, that of the San Joaquin & Kings River Canal & Irrigation Company Incorporated, the complaint alleges that, under an appropriation and diversion of the waters of the San Joaquin River, made in the year 1871, by the San Joaquin & Kings River Canal & Irrigation Company, the predecessor in interest of the plaintiff, the said company was the owner, from the year 1871 down to the twelfth day of June, 1905, of the right to divert from said river a flow of one thousand cubic feet of water per second; that under a similar appropriation and diversion, made in the year 1897, the said company was the owner, from the last-mentioned year down to the twelfth day of June, 1905, of the right to divert from said river an additional flow of 350 cubic feet per second of the waters thereof; that on the day last mentioned said company sold and transferred to the plaintiff all of its said water rights, together with its canals and works for the diversion and distribution of said water, and that plaintiff has been ever since said transfer, and now is, the owner thereof; that both the plaintiff and its said predecessor were public service corporations and that as such they each, during the time of their respective ownerships thereof, devoted said water to the public use for irrigation of land and other beneficial purposes. It further alleges that during all of this time the defendants were fully aware of the diversion and public use of said water by said plaintiff and its said predecessor, and that the defendants did not object to the same, nor did they, or either of them, divert or use the water of said river until within the last five years preceding the commencement of this action; that during said five years defendants have taken and diverted from the river large quantities of the waters thereof, thereby depriving the plaintiff of the water to which it is entitled as aforesaid, and that the rights of the defendants in said

waters are subject and subordinate to the said rights of plaintiff. The action was begun on October 6, 1913.

The prayer is that plaintiff's title to its said water rights be quieted and that the defendants be enjoined from diverting water so as to interfere therewith.

In case No. 3120, that of Miller & Lux Incorporated and Union Colonization Company, the complaint alleges a diversion from the San Joaquin River of 120 cubic feet of water thereof by the predecessor of said plaintiffs in the year 1872, and the continuous use thereof by said predecessor in interest and by plaintiffs as owners in common as successors, by the continuous distribution thereof for the irrigation of land and other purposes, through a canal known as the Chowchilla canal, and that plaintiffs as such successors are now the owners of the said canal and of the right so acquired in 1872 by the plaintiffs' predecessors in interest to take said quantity of water for the beneficial purposes aforesaid. It further alleges that the plaintiff, Miller & Lux Incorporated, owns a number of parcels of land, fully described, bordering upon the said river and the branches and channels thereof; that the plaintiff Union Colonization Company is also the owner of certain described parcels of land riparian to said river; that the plaintiffs, respectively, have for many years diverted and used the waters of the river and its branches and channels for the irrigation of their said lands, and that other portions of the said lands, by reason of their low elevation, are annually and periodically overflowed and moistened by the waters of said river, and thereby its productiveness is greatly increased; that the riparian right of the said plaintiffs to use the waters of said river and its branches upon their land as aforesaid is subject to the right of the plaintiffs by appropriation to take and use the 120 cubic feet of water per second as above mentioned; that within five years last past the defendants have constructed pumping plants above the head of the said Chowchilla canal and above the lands of plaintiffs above mentioned, and by means thereof have taken large quantities of water from the river so as to prevent plaintiffs from diverting or using the water so appropriated and owned by them as aforesaid and from receiving and using the waters necessary for the irrigation and moistening of their lands riparian to said river as aforesaid; that the rights of

the plaintiffs to said 120 cubic feet of water and to the use of said water on riparian lands are superior to those of the defendants in said stream; that the defendants have no right to the waters of the said river.

The prayer is that plaintiffs be adjudged to be the owners of the right to divert said 120 second-feet of water from said river, and of the right to have said river flow through their said riparian land and to the reasonable use of the waters thereof on said land; that said right to said 120 second-feet be quieted and declared superior to any rights of defendants, and that the riparian rights, if any, of defendants and plaintiffs be ascertained and justly apportioned and defined. This action was begun on April 17, 1914.

In case No. 3119 several of the defendants filed separate answers. Each defendant claimed the right to use the waters of the river as riparian owner of land situated on the river above the points of diversion of the plaintiff.

In case No. 3120 the answers set up the ownership of land riparian to the stream and the right to use the waters thereof as riparian owners, all of said land being situated above the riparian lands of the plaintiffs in said action and above the point of diversion by said plaintiffs of said 120 second-feet of water.

In case No. 3119 the court found that the plaintiff was the owner, subject to certain rights found to be in the defendants, of the right to divert from said river a continuous flow of 1,360 cubic feet of water per second, of which 760 second-feet was held under said appropriation made in 1871 and 600 second-feet was held under the said appropriation made in 1897, mentioned in the complaint; that the defendants, within five years last past, have, by means of pumps, diverted from the river above said plaintiff's dams large quantities of water and thereby the plaintiff has been prevented from diverting and using the amount of water so appropriated and owned by it as aforesaid, and that the said appropriation and use of said water by the plaintiff was notorious, but was unknown to said defendants and that said defendants did not consent thereto.

As to the defendants' rights in said case the court found that certain of the defendants, respectively, owned tracts of land bordering upon said river above the head of said canals of plaintiff, and that as such owners they are entitled to

take and use for the irrigation of said lands a reasonable amount of the waters of said river, and that said riparian rights of the defendants are superior to said rights of the plaintiff.

It further found that of said riparian lands of the defendants, certain parcels, containing in the aggregate nearly 6,000 acres, were a part of the public land of the United States at the time of the appropriation of the 760 second-feet of water in 1871 now owned by the plaintiff, and that at the time of said appropriation other parcels of the defendants' riparian land, aggregating over 500 acres, were not at that time part of the public lands of the United States, but belonged to private owners.

It also found that the headgates and dams of plaintiff's said canals are situated on lands which at the time said first appropriation of 760 feet was made were classed and claimed as swamp and overflowed lands by the state authorities; that applications to purchase the same from the state were made and approved in 1864; that pursuant to said applications the state issued patents to said purchasers; that said lands were listed by the United States to the state of California as swamp and overflowed lands on November 21, 1895, and were patented to the state on January 10, 1896, and that the plaintiff had acquired all the title of the original purchasers from the state to the lands on which its headgates and dams are situated. At the time of the 1897 appropriation, under which plaintiff diverts 600 second-feet of water, all of the lands involved in the action were in private ownership. On March 3, 1877, when the desert land law was enacted by Congress, 2,162 acres of defendants' said riparian lands were public lands of the United States.

With respect to case No. 3120 the court found that the plaintiffs therein were the owners as tenants in common, subject to certain rights of the defendants therein, of the right to divert and use 120 cubic feet flowing per second of the waters of the San Joaquin River, by and through the Chowchilla canal, which right began in the year 1872, the headgates thereof being in part on land entered from the state as swamp and overflowed land by entry approved on March 23, 1861, and patented by the state to the purchaser in 1874, and in part on lands similarly entered from the state by entries approved and patented in 1869; that all of



said land was listed to the state by the United States as swamp and overflowed land in 1895 and patented to the state in 1896 as aforesaid, and that said right of plaintiffs was subject and subordinate to the riparian rights of the defendants therein as found to exist by the court; also that the plaintiffs Miller & Lux Incorporated and Union Colonization Company, respectively, were the owners separately of certain tracts of land riparian to the river, particularly described, as alleged in the complaint, and that the defendants severally have within the last five years pumped out of said river and used on their own land riparian thereto large quantities of water, and thereby have deprived the plaintiffs of the water so appropriated by them through the Chowchilla canal, and have diminished the water available to the said plaintiffs on their said riparian tracts of land.

The riparian lands of the defendants described are the same as those described in the other findings in case No. 3119, so far as they lie above the headgate of the said Chowchilla canal, and the dates when they ceased to be public land are the same as the dates given in the findings in the other case.

The conclusions of law in each case were as follows:

That the rights of the several defendants to take and use water from the San Joaquin River on lands riparian thereto, situated above the plaintiff's points of diversion under their respective appropriations, are paramount to the rights of the plaintiffs under such appropriation, regardless of the times when the uses on the riparian land began, and regardless of the fact that large portions of said riparian land were at the time of the inception of the appropriations part of the public land of the United States; in other words, that the rights of said riparian proprietors to use water from the river on the riparian land are superior to the rights of the plaintiffs under the several appropriations made before the use on the riparian land begun.

The conclusions in each case also involve the proposition, although not expressly stated, that the fact that when the several appropriations under which plaintiff's claims were initiated, the land on which the headgates and dams were located was swamp and overflowed land which had been previously entered from the state as such land and afterward patented by the United States to the state, is not a

material factor in the case, and the question whether such land is or is not to be regarded as land in private ownership from the time of the entry thereof under the state laws as swamp and overflowed land.

The plaintiffs insist that their rights to the water of the river, under the appropriations of 1871 and 1872, are superior to the riparian rights thereto, pertaining to the land of the defendants situated above the dam and headgates of the plaintiffs' canals, with respect to all of said lands that were public lands of the United States or of the state of California at the time the plaintiffs' appropriations were made, respectively.

The question, for the purposes of discussion, should be subdivided into two parts: 1. Where the land on which the diversion works are located is, at the time the diversion is effected, in private ownership, or is held in other ownership than that of the United States; 2. Where the diversion works are made on land then belonging to the United States, as part of its public domain. We will take up these subdivisions in the order stated.

The plaintiffs rely upon the act of Congress of July 26, 1866 (14 U. S. Stats. 253, sec. 9, [9 Fed. Stats. Ann., 2d ed., p. 1349; U. S. Comp. Stats., sec. 4647]), and of July 9, 1870, supplemental thereto (16 U. S. Stats. 218, sec. 17, [9 Fed. Stats. Ann., 2d ed., p. 1360; U. S. Comp. Stats., sec. 4648]), and of the Desert Land Act of March 3, 1877 (19 U. S. Stats. 377, [8 Fed. Stats. Ann., 2d ed., p. 692, etc.; U. S. Comp. Stats., secs. 4674-4678]). Their contention is that these acts have the effect of giving the appropriator of water for the irrigation of land in private ownership, who makes his diversion by means of a dam or headgate also located on land in private ownership, a right paramount to all riparian rights pertaining to public land situated above such place of diversion.

Section 17 of the act of 1870 purports to be amendatory of section 9 of the act of 1866. The appropriations in question were made subsequent to 1870, and, therefore, the two acts may be taken together in order to determine the effect thereof in the present case. So considered they are as follows:

"Wherever by priority of possession rights to the use of water . . . have vested and accrued, and the same are recog-

nized by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed" (sec. 9). "All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the aforesaid section 9" (sec. 17).

[1] Proceeding to an analysis of this language, it will be seen that the only water rights which are protected, maintained, acknowledged, or confirmed by these enactments are those rights which "are recognized by the local customs, laws, and decisions of the courts." This, of course, means in each case the customs, laws, and decisions of the courts in the particular state in which the appropriation is made and in which the land affected lies. Section 17, taken in connection with section 9, must be construed as declaring that lands granted by patents issued by the United States shall be subject to such water rights as had previously vested or accrued under rules which have been established or recognized as law by the decisions of the courts of this state on the subject. [2] It is necessary, therefore, to determine whether or not the decisions of our courts have established the proposition that an appropriation from a stream for use upon lands in private ownership, and made by means of a dam situated upon lands in private ownership, gives to the appropriator a right to the water appropriated which is superior to the right of riparian owners above to the use of water from the stream upon the riparian land. There are no decisions in this state which declare or recognize this doctrine. On the contrary it has always been held that the rights of the riparian owner of such land above are superior to those of the diverter or appropriator below. The law as established and recognized by the decisions of this state, in every case in which it has been considered, is declared to be that the rights of a riparian owner in the waters of the abutting stream are not affected by any interference with the waters of the stream, made on privately owned land after they pass below the boundaries of such riparian land. Such use below, no matter how long

continued or what may be the nature of the claim of right thereto by the user thereof, in no manner affects the riparian rights pertaining to the land above the place of use and point of diversion. Thus in *Hargrave v. Cook*, 108 Cal. 77, [30 L. R. A. 390, 41 Pac. 19], the court said: "With any use or diversion of the water after it has passed his land the upper riparian proprietor, having no ownership in and no longer any rights to it, would have no concern. . . . None of his rights would or could be impaired thereby, and without such an impairment he would be without injury, and, consequently, without cause for complaint or redress. His right extends no further than the boundary of his own estate. He cannot complain of the mere facts of the diversion of the watercourse either above or below him, if within the limits of his own property, it is allowed to follow its accustomed channel." And further, speaking of the effect of these facts on the law of prescription, the court proceeds to say: "Before one can acquire a right to the doing of an act in which another so acquiesces, the act itself must amount to an invasion of that other's right, and the doing must either have been so long continued as that a prescriptive claim can be supported upon the theory that the acquiescence presupposes a grant, or under such circumstances as will raise an estoppel against the objecting party. But, as the upper riparian proprietor's right to object to any use or diversion of the water below ceased when it had flowed past his boundary, any such use could not work an invasion of his rights, and he was not called upon to protest against it." The same doctrine has been declared in *Hanson v. McCue*, 42 Cal. 310, [10 Am. Rep. 299]; *Bathgate v. Irvine*, 126 Cal. 140, [77 Am. St. Rep. 158, 58 Pac. 442]; *Cave v. Tyler*, 133 Cal. 567, [65 Pac. 1089]; *Hudson v. Dailey*, 156 Cal. 627, [105 Pac. 748]; *Perry v. Calkins*, 159 Cal. 177, [113 Pac. 136]; *Miller & Lux v. Enterprise etc. Co.*, 169 Cal. 423, [147 Pac. 567]; and *Holmes v. Nay*, 186 Cal. 231, [199 Pac. 327].

[3] The proposition is settled by these decisions and it should be adhered to as a rule of property, even if we were doubtful of its soundness in logic, reason, and justice. But we have no such doubt. The rule that such diversions do not affect the upper riparian rights follows logically from the well-settled rule stated in the above-cited cases and in every other case on the subject of prescription, that "in order

to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the rights of the party against whom it is set up. The enjoyment relied upon must be of such a character as to afford ground for an action by the other party." (*Anaheim W. Co. v. Semi-Tropic W. Co.*, 64 Cal. 192, [30 Pac. 625].)

The precise question presented in this case was decided in *Cave v. Tyler*, above cited. It was there expressly held that a diversion or appropriation of water of a stream, the diversion being on land privately owned and for use on such land, at a point below a tract of government land abutting on the stream only at points above such point of diversion, and the use thereof for five years, gave the appropriator or diverter no rights under the aforesaid acts of Congress as against the riparian rights of a subsequent purchaser from the United States of government land situated upon the stream above the point of diversion. The nature of the water rights intended to be recognized and protected by the said acts of Congress are there clearly described by Justice McFarland. We cannot hope to speak with greater authority on such a subject than this eminent jurist. He was an active practitioner at the bar in the mining regions of California during the period when the rights referred to in said acts became established and "recognized" by the "local customs, laws, and the decisions of the courts." No one could be better advised than he as to those customs, laws, and decisions and the nature of the rights intended to be maintained and protected by the acts aforesaid. [4] Inasmuch as neither the local customs, the local laws, nor the decisions of the California courts had ever recognized or upheld the doctrine that water rights acquired by an appropriation or diversion below on private land would be superior to the riparian rights pertaining to any land above the place of diversion, the conclusion is inevitable that section 9 of the act of 1866 neither creates such superior right nor provides for the maintenance or protection of such rights.

[5] On the second phase of the questions the decisions in this state are to the effect that where the diversion is made on land then belonging to the United States, the right of the appropriator to the water thereby taken is superior to the riparian rights of a subsequent purchaser of land from

the United States lying above the point of diversion. (*South Yuba etc. Co. v. Rosa*, 80 Cal. 333, [22 Pac. 222]; *Healy v. Woodruff*, 97 Cal. 464, [32 Pac. 528]; *Wood v. Etiwanda Water Co.*, 122 Cal. 153, [54 Pac. 726].) The opinions in these cases decide the question but do not state fully the reasons for the conclusion. It is apparent, however, that they must be based on the hypothesis that the reservation provided for by section 17 of the act of 1870 in favor of accrued and vested rights runs to the appropriator of water upon land of the United States and creates in him a right superior to that of the riparian right of the United States pertaining to the land it then owns situated above the place of diversion, so that a subsequent purchaser of such upper lands takes subject to the lower appropriation. We need not go further into the reasons for these decisions, for we are of the opinion that the appropriations under which the plaintiffs claim were not made on land which was at the time thereof the property of the United States in the sense that it must be in order to come within the scope of the two acts of 1866 and 1870. To this question we now address ourselves.

The important facts bearing upon the question last mentioned are as follows: The tracts of land on which the dams and headgates by which said respective appropriations were made are situated are of the character known as swamp and overflowed lands. Said tracts were acquired from the state of California by the respective predecessors in interest of the plaintiffs, under applications to purchase the same as swamp and overflowed lands. These several applications were approved in the years 1861, 1864, and 1869, respectively, and patents therefor were issued by the state to the respective entrymen under said applications in the years 1869 and 1874. Said several tracts were listed and set off by the United States to the state of California as swamp and overflowed lands on November 21, 1895, and in pursuance thereof they were patented to the state with other swamp and overflowed land on June 10, 1896.

The theory of the plaintiff on this point is that the title to these swamp and overflowed lands remained in the United States until they were patented to the state in 1896, that this title was absolute and unqualified, that, therefore, these appropriations were made on public land of the United



States, and, accordingly, that the appropriations of 1871 and 1872 were superior in right to all riparian rights pertaining to any land at that time belonging to the United States situated on the stream above said place of diversion.

The swamp and overflowed lands were granted to the state by the United States by the act of September 28, 1850, [9 Fed. Stats. Ann., 2d ed., pp. 504, etc.; U. S. Comp. Stats., secs. 4958-4960]. By that act it was made the duty of the Secretary of the Interior "to make out an accurate list and plats" of all such lands situated within each state, and, at the request of the Governor thereof, to "cause a patent to be issued to the state therefor." The act declares that "on that patent, the fee simple to said lands shall vest" in such state. It has been decided many times, and upon careful and elaborate consideration, both by the United States supreme court and by this court, that this act operated as a present transfer at that date to each state of all lands within its borders coming within the description of "swamp and overflowed" lands, and that the title of the state thereto did not depend on the actual issuance of a patent to the state therefor by the United States. (*French v. Fyan*, 93 U. S. 170, [23 L. Ed. 812, see, also, Rose's U. S. Notes]; *Wright v. Roseberry*, 121 U. S. 488, 509, [30 L. Ed. 1039, 7 Sup. Ct. Rep. 985]; *Tubbs v. Wilhoit*, 138 U. S. 137, [34 L. Ed. 887, 11 Sup. Ct. Rep. 279]; *Owens v. Jackson*, 9 Cal. 322; *Summers v. Dickinson*, 9 Cal. 554; *Kernan v. Griffith*, 27 Cal. 89; *Tubbs v. Wilhoit*, 73 Cal. 63, [14 Pac. 361]; *Foss v. Johnstone*, 158 Cal. 119, 130, [110 Pac. 294].)

The decisions in *Michigan etc. Co. v. Rust*, 168 U. S. 589, [42 L. Ed. 591, 18 Sup. Ct. Rep. 208], *Brown v. Hitchcock*, 173 U. S. 473, [43 L. Ed. 772, 19 Sup. Ct. Rep. 485], *McCormick v. Hayes*, 159 U. S. 338, [40 L. Ed. 171, 16 Sup. Ct. Rep. 37], *Chapman v. St. Francis Levee Dist.*, 232 U. S. 186, [58 L. Ed. 564, 34 Sup. Ct. Rep. 297], *United States v. Chicago etc. Co.*, 218 U. S. 242, [54 L. Ed. 1015, 31 Sup. Ct. Rep. 7], and *Sawyer v. Osterhaus*, 212 Fed. 765, do not overrule *French v. Fyan* and the other cases first cited, as the plaintiffs contend. On the contrary, it is stated in all of them that the act of 1850 operates as a present grant to the state of the swamp and overflowed lands within the particular state. They merely hold that while the act of 1850 grants the equitable title, it does not carry the legal title, that iden-



tification of the lands as swamp and overflowed lands in the manner specified in the act and the issuance of a patent therefor by the United States to the state is necessary to pass the legal title out of the United States. They further declare that prior to the final identification of the lands as swamp and overflowed lands by the final lists and plats of the Secretary of the Interior, it is within the power of that officer to revise his surveys, lists, and plats, and make corrections therein, under proper proceedings and notice to the particular state, or its successors in interest, and that the identification of the lands cannot be considered as finally settled until this is done and the patent issued in accordance therewith. They all recognize, however, that the beneficial title of the state, under the act, is full and complete, lacking only the identification of the land and the issuance of patent in pursuance thereof, to convert it into a legal title. They also affirm the proposition that the Land Department of the United States has no power arbitrarily to destroy the equitable title so granted to the state, although it has jurisdiction, "after proper notice to the party claiming such equitable title, and upon a hearing, to determine whether or not such title has passed."

[6] It clearly follows, therefore, that the full beneficial enjoyment of the land passed to the state by the act of 1850, and at that time, subject to the contingencies incident to identification and to no others. It would also follow of necessity that when thereafter, as appears here, the land is identified, and a patent therefor issued by the United States, all questions concerning the title of the state or any person claiming under it cease to be of any consequence. The title so finally transferred relates back to the year 1850 and inures to the benefit of the state and its successors in interest for all purposes, as if the legal title to the land finally identified had passed at the date of the act. The acts of 1866 and 1870 could not have been intended to operate for the benefit of appropriations made upon land in which the United States did not then have, and has never since acquired, any beneficial interest.

[7] Our conclusion is that the appropriations of 1871 and 1872, by which the water rights of the plaintiff were acquired, are not, by the aforesaid acts of Congress of 1866 and 1870, made superior or paramount to the riparian

rights pertaining to the public lands of the United States situated on the stream above the place of diversion and afterward purchased by the defendants from the United States.

[8] The findings show that some 2,242 acres of land belonging to the defendants and upon which they are using water from the river were purchased by them, respectively, from the United States after the passage of the act of March 3, 1877, known as the Desert Land Act. It is contended by the plaintiffs that, with respect to the waters used by these defendants on said lands under claim that they had a right to do so as riparian owners, the rights of the plaintiffs under their said appropriations are made paramount to such riparian rights by the provisions of the said Desert Land Act. (19 U. S. Stats. 377, [8 Fed. Stats. Ann., 2d ed., p. 692; U. S. Comp. Stats., sec. 4674].)

The title of this act is, "An act to provide for the sale of desert lands in certain States and Territories." It provides for the sale of desert lands in amounts not exceeding one section to any qualified person who declares on oath that he intends to reclaim such desert land by conducting water upon the same within three years thereafter. Then follows a proviso as follows: "Provided however that the right to the use of water by the person conducting the same, on or to any tract of desert land of six hundred and forty acres, shall depend upon *bona fide* prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, *shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.*" (Sec. 1.) Section 2 of the act provides: "That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act." Section 3 provides further that "the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

The theory of the plaintiffs is that this act operates as a separation of the riparian rights pertaining to all lands of the United States from the land itself and a dedication of the waters covered by such riparian rights to public use for irrigation, mining, and manufacturing purposes, and that in consequence of this dedication the riparian rights pertaining to the land acquired from the United States by the defendants after the passage of said act are subject and subordinate to the rights of the plaintiffs to take the water so appropriated by them and devote the same to public use as they have been and are doing. In support of this proposition the plaintiffs rely on the decision of the supreme court of Oregon in *Hough v. Porter*, 51 Or. 318, [95 Pac. 732, 98 Pac. 1083]. The court in that case, in a very elaborate opinion, reached the conclusion that the last clause of section 1 above quoted applied to all lands of the United States and was a dedication of the waters thereon to public use subject to existing rights. The supreme court of Washington, however, in *Still v. Palouse etc. Co.*, 64 Wash. 606, [117 Pac. 466], and in *Bermot v. Morrison*, 81 Wash. 538, [Ann. Cas. 1916D, 290, 143 Pac. 111], reached precisely the opposite conclusion. In the first-mentioned Washington case the court said: "The act itself manifestly relates only to the reclamation of desert lands and confines the use of the water to the amount 'actually appropriated and necessarily used for the purpose of irrigation and reclamation,' such right to be determined by *bona fide* prior appropriation. As to such lands, Congress recognized and assented to the appropriation of water in contravention of the common-law right of the lower riparian owner to insist on the continuous flow of the stream," and it proceeded to hold that as none of the persons making this claim had settled upon or obtained the land as desert lands under the act of 1877, no rights under said act were attached to such lands. This decision was followed in the subsequent case. We think the conclusion of the Washington supreme court was correct. It is obvious from the framework and language of the act of 1877 that it was not intended to apply to all the public lands of the United States. Its main purpose was to provide for the sale of desert lands which could be reclaimed by bringing water thereon. It may be true that as to such lands the purpose was to divert the riparian rights in the waters ex-

isting thereon and devote the same to the public uses stated. We do not think that question is involved in the present case and we need not express any opinion on it. There is nothing in the act which justifies giving that particular part thereof so wide an application as to embrace all lands of the United States, wherever situated. The plaintiffs do not claim that any of the land belonging to the defendants was purchased or acquired under the Desert Land Act, and there is no finding that in fact such lands were desert lands. The act itself commits the determination of the question what may be considered desert lands to the commissioner of the general land office. It is not claimed that he has made any determination of the fact with respect to any tract of land in controversy in this action. It was for the plaintiffs to show this fact, if it were material to their case, and as they have not done so we must presume that no such determination was ever made. It follows from what we have said that the rights of the plaintiffs under their appropriations are not affected by the provisions of the Desert Land Act.

[9] Another contention of the plaintiffs is that the defendants are estopped to assert that their title as riparian owners is paramount to the rights of the plaintiffs under their appropriations below. They claim the estoppel on the ground that the plaintiffs have been diverting the water by means of its canals and under its appropriation and devoting the same to public use for irrigation and other purposes for more than forty years, and that the defendants did, during all of that period, permit the water of the stream to flow by their own lands without any use thereof and to pass on down to the plaintiffs' headgate, there to be taken out and appropriated to the public use, without protest, objection, or notice of their respective claims. In support of this estoppel they invoke the rule set forth in the decisions of this court in cases where a railroad company or canal company serving a public use has taken the land of another for such railroad or canal and has operated the same without objection by the owner and without compensating him therefor. In these cases it is held that the owner of the property, after having permitted such public use to begin and continue until public rights have accrued therein, cannot enjoin the operation of the railroad or canal, and that his only remedy is an action for damages for the taking of his property for

public use. (*Fresno etc. Co. v. Southern Pac. etc. Co.*, 135 Cal. 207, [67 Pac. 773]; *Southern California Co. v. Slauson*, 138 Cal. 344, [94 Am St. Rep. 58, 71 Pac. 352]; *Gurnsey v. Northern C. P. Co.*, 160 Cal. 709, [36 L. R. A. (N. S.) 185, 117 Pac. 906]; *Katz v. Walkinshaw*, 141 Cal. 136, [99 Am. St. Rep. 35, 64 L. R. A. 236, 70 Pac. 663, 74 Pac. 766]; *Crescent Canal Co. v. Montgomery*, 143 Cal. 248, [65 L. R. A. 940, 76 Pac. 1032]; *Newport v. Temescal Water Co.*, 149 Cal. 538, [6 L. R. A. (N. S.) 1098, 87 Pac. 372]; *Barton v. Riverside Water Co.*, 155 Cal. 515, [23 L. R. A. (N. S.) 331, 101 Pac. 790].)

The finding of the court is "that the taking, appropriation, *and use* of said water by plaintiffs was notorious, but was unknown to the said defendants, and the said defendants did not acquiesce in or assent thereto." (Italics ours.) It is contended that this finding is contrary to the evidence. It devolved upon the plaintiffs, in support of their estoppel, if the fact was material to such estoppel, to prove that the defendants had knowledge not only of the existence of the canals and the diversion of the water thereby from the river, but also that the same was being devoted to public use. The only evidence on the subject consisted of a number of extracts from articles published in California newspapers in the years from 1871 to 1878, inclusive. The nearest newspaper to the location of the lands of the defendants was the "Fresno Expositor," which published one article on the subject in 1873. The articles referred to the size of the canal, the extent of territory to be irrigated thereby, but did not definitely state whether the use to which the water was to be applied was a public or private use. No evidence is called to our attention showing actual knowledge on the part of any one of the defendants that the plaintiffs, or either of them, were engaged in supplying water for public uses, or that either of them had ever seen any of the publications introduced in evidence. The fact that the taking and use of the water was notorious, as found by the court, was not proof of knowledge by defendants, but was merely a circumstance from which, with other circumstances, the court might or might not have inferred such knowledge. Its finding shows that it did not infer knowledge. We do not think the finding was contrary to the evidence. In our consideration of the case, therefore, it must be assumed that none

of the defendants had knowledge of the public use to which the water was devoted. We do not mean to say that such knowledge was material, however.

The question presented by the plaintiffs in regard to such estoppel has never been decided by this court. In *Miller & Lux v. Enterprise etc. Co.*, 169 Cal. 423-430, [147 Pac. 579], the court discussed the question at length and set forth the various decisions on the subject and the reasons which support the doctrine which the plaintiffs invoked. After so doing, however, the court declined to decide the question. After extensive quotations from the decisions holding that injunction would not be granted in the cases stated, the court said: "It is to be observed that in all of the above cases the public use involved an interference with the property rights of a private owner, sufficient to give such owner an immediate right of action to abate or prevent the same. . . . This right in the owner to enjoin the public use before it had become established, appears to have constituted an important factor in the statement of the doctrine." (Page 430.) This case, it may be observed, involved the same canal and the same appropriation that is involved in S. F. No. 3119, now under consideration.

[10] From what we have already said it is clear that the upper riparian owners could not have maintained any action or proceeding to prevent the appropriation of the water from the stream by plaintiffs after it had passed below defendants' lands. It is difficult to see how they could be estopped by the taking of the water below and its dedication to a public use when they could by no means within their power prevent or restrain the same. In order to constitute an estoppel of this character the person sought to be estopped must have failed to do some act which it was within his power to do and the person claiming the estoppel must have relied on such failure to such an extent and for such a period that the subsequent doing of such act would cause him injury. In the present case the act which it is now claimed the defendants should have done was not within their power. They could not have prevented the appropriations by the plaintiffs. We may add that since the courts had many times decided that a diversion below his land did not concern or injure the riparian owner above, and they had each presumably rested secure in this rule, which had become a



rule of property, it would not be consonant with justice to say to such proprietor that he has lost those rights through no fault or failure of his own, but simply because he has not seen fit to use the waters upon his riparian land, and that to do so would be equivalent to this court erecting a statute of limitations against an upper riparian proprietor, and in the same breath decreeing that it had barred all his rights. For these reasons we are of the opinion that no estoppel is created against the defendants to now claim their riparian rights, although the same may cause injury to the plaintiffs' appropriation by consuming part of the water of the stream before it reaches the plaintiffs' place of diversion.

[11] It appears that the court found that certain of the defendants had obtained by prescription a right to divert from the stream at points above the plaintiffs' places of diversion some 13  $\frac{75}{100}$  second-feet of water, which they had applied to the irrigation of some thirty-one acres of nonriparian land and 759 acres of riparian land. They claim that this finding is not sustained by the evidence nor by the law. We know of no rule of law that would prevent a person who owned land riparian to the stream above the place of diversion of water therefrom by some other person, even by a public service corporation for public use, from taking water from the stream and acquiring title thereto by prescription as against such public use. A public service corporation is no more exempt from this deprivation than any other owner of a water right. Nor are we aware of any rule of law that any person, although not a riparian owner, may not acquire a prescriptive right as against a public use below by taking water out of the stream above which otherwise would run down to the canals of the public service corporation. It is not claimed that the evidence does not show that the taking and use of the water was adverse, under claim of right, and continuous for a period of five years before the action was begun. Such being the case there is no merit in the claim that the finding is not sustained by the evidence. Furthermore, with respect to the use on the riparian lands, inasmuch as the owners had the right to use the same without asking leave of the plaintiffs, the finding that they acquired the right by prescription is immaterial. With respect to the finding as to defendants' rights by prescription, the plaintiffs complain that the pleadings did not aver



such right and that, therefore, such finding was improper. This objection affects only the right adjudged to defendant White & Friant Lumber Company to take about one and one-fourth second-feet of water for irrigation on thirty-one acres of nonriparian land. The pleading was lacking in certainty as to the quantity claimed and taken. But there was no demurrer for uncertainty and no objection to any evidence on the subject. Under all these circumstances, the lack of sufficient averment should be deemed to have been waived at the trial.

As to the claim that the diversions above did not, so far as appears, diminish the stream flowing at their dams to such an extent as to deprive plaintiffs of the quantity of water they had appropriated, it is sufficient to refer to *Horst v. Tarr M. Co.*, 174 Cal. 436, [163 Pac. 492], and to say that the complainants herein are based on the allegation and theory that the diversions by defendants did deprive plaintiffs of water to which they were entitled.

No other points worthy of mention are presented in support of these appeals.

In each of the cases mentioned herein the judgment is affirmed.

Lennon, J., Shurtleff, J., Sloane, J., Wilbur, J., and Waste, J., concurred.

Rehearing denied.

All the Justices concurred.

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[S. F. No. 9461. In Bank.—January 5, 1922.]

LAVINIA J. HOTALING, Respondent, v. RICHARD M. HOTALING et al., Appellants.

[1] GIFT—RECOVERY OF CORPORATE STOCK—ACTION BY MOTHER AGAINST SON—EVIDENCE—BURDEN OF PROOF.—In an action by a mother against her son to declare a trust in her favor and have restored to her shares of stock of a corporation claimed by the defendant as a gift from the plaintiff, proof by him that there had been a legal transfer of the shares from his mother to him on the corporate records casts the burden upon her to show, either

that the transfer never operated to invest the ownership of the shares in the defendant, or that if the gift was actually made, it was voidable on the ground of fraud or undue influence.

- [2] **APPEAL—FINDING—CONFLICT OF EVIDENCE.**—A finding on testimony which is substantially conflicting cannot be disturbed by the appellate court whatever the views of the court as to the comparative strength of the testimony to the contrary.
- [3] **ID.—TESTIMONY OF ATTORNEY—CONSIDERATION ON APPEAL.**—The testimony of an attorney in behalf of his client, so far as the appellate court is concerned, is to be received and considered as that of any other witness, in view of the inherent quality of his testimony, his interest in the case, and his appearance on the witness-stand.
- [4] **ATTORNEY AT LAW — EVIDENCE — WITNESS.**—The propriety of a lawyer occupying the dual capacity of attorney and witness is purely one of legal ethics largely to be determined by the attorney's own conscience, and while it is not a practice to be encouraged, it may often occur that conditions exist in which an attorney cannot justly or fairly withhold from his client either his legal services or his testimony as a witness.
- [5] **GIFT — CORPORATION STOCK — SUFFICIENCY OF EVIDENCE.**—In this action by a mother to recover from a son shares of stock in the family estate corporation claimed by him as a gift from her, and of which corporation she was the president and the son an officer and director and active in the management of its affairs, the finding that no gift was made by her is held to be sufficiently supported by her denial that she ever knowingly transferred the title, and her testimony that as president she frequently signed papers at the son's request without reading them and without knowledge as to their contents.
- [6] **ID.—IGNORANCE OF CHARACTER OF STOCK CERTIFICATES—EVIDENCE —DIVIDEND CHECKS.**—Familiarity with dividend checks containing an order for the payment of dividends on stock does not tend to establish familiarity with the stock certificates themselves, and such checks are inadmissible to rebut a statement of ignorance of the physical aspects or contents of the certificates.
- [7] **ID.—PROVISION FOR FUTURE NEEDS—IMMATERIAL ISSUE.**—In an action between a mother and son involving the issue as to whether the former had made to the latter a gift of shares of stock in a corporation, the question as to whether the son had made subsequent provision for the possible future needs of the mother was immaterial, in the absence of any claim that the same was a condition or consideration for the transfer.

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- [8] **ID.—OWNERSHIP OF STOCK—SELF-SERVING DECLARATIONS.**—In an action between a mother and son involving the ownership of shares of stock in the family estate corporation which the defendant claimed as a gift from her, the cross-examination of the defendant as to whether he had said anything to certain persons connected with the corporation as to his ownership of the stock did not justify a redirect examination that he had informed certain other persons not connected with the corporation of his ownership.
- [9] **EVIDENCE—SELF-SERVING DECLARATIONS.**—Declarations made by a party in his own interest are commonly inadmissible, but exceptions to the rule exist under circumstances where a failure to assert a claim or right may be construed against the party as an implied negation, or where the assertion of such claim at a later date is attributed to conditions and exigencies which have arisen since the transaction in question, which motive would be disproved by showing earlier declarations to the same effect.
- [10] **ID.—CUMULATIVE EVIDENCE—COLLATERAL TRANSACTION.**—The exclusion of evidence which is merely cumulative of an undisputed fact, and which relates to a transaction entirely collateral to the main issue, is not error.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. H. Metson, E. J. McCutchen and Peter F. Dunne for Appellants.

Gavin McNab, Nat Schmulowitz and R. P. Henshall for Respondent.

John T. Williams and T. J. Sheridan, *Amici Curiae*, for Appellant.

SLOANE, J.—This action was brought by the plaintiff, Lavinia J. Hotaling, to declare a trust in her favor and have restored to her 2,499 shares of the capital stock of the Hotaling Estate Company, a corporation, which stock at the time suit was begun stood on the books of the corporation in the name of the defendant, Richard M. Hotaling.

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9. When declarations of a party are admissible in his favor, note, 93 *Am. Dec.* 279.

The fact is undisputed that these shares of stock, with one additional share, had originally been issued to and belonged to the plaintiff as her interest in a family estate represented by the above-named corporation. The remaining stock was held in blocks of two thousand five hundred shares each by her son, Richard M. Hotaling, the defendant, another son, Fred Hotaling, and a daughter-in-law, Ella Hotaling, the widow of a deceased son of plaintiff. The plaintiff was the president of this corporation and she and her sons and daughter-in-law constituted its board of directors. The certificate representing these shares in plaintiff's name had been subsequently indorsed by the plaintiff, and canceled, and a new certificate signed by the plaintiff as president of the corporation was issued in the name of Richard M. Hotaling.

On the face of the corporation records the shares in controversy had been transferred from the plaintiff, Lavinia J. Hotaling, to the defendant, Richard M. Hotaling.

The plaintiff and Richard M. Hotaling, as already stated, are mother and son. The whole controversy in the case centers about the claim of the latter that his mother made him a gift of this stock on the 2d of September, 1913, the date of the transfer on the stock books, and some five and a half years before this action was begun.

Richard testifies circumstantially to this transaction, and represents that it was unsolicited on his part, and was made on his mother's own initiative, and that she came to the office of the corporation, of which she was president and of which he was an officer and director, and that the transfer was then and there made by delivering to him the indorsed certificate and issuing the new certificate over his mother's signature as president.

Mrs. Hotaling admits the genuineness of her signature upon written evidences of the transfer, but denies the gift, and disclaims any remembrance of the transaction which resulted in the transfer. There is no other direct evidence as to the transaction than that of the documents and the corporate records above referred to and the testimony of these two principals.

All the other voluminous record in the case, comprising in all over one thousand typewritten pages, is directed to evidence on collateral matters and events tending more or less

strongly to corroborate one or the other of the parties as to the main issue.

The trial court found for the plaintiff on all the material issues presented, and it is from the judgment on these findings that the defendants have taken this appeal.

The grounds of error relied on are insufficiency of the evidence to support the findings and the exclusion on the trial of certain evidence offered in behalf of defendants.

The one controlling fact in this case is in the finding of the court that the plaintiff, Lavinia J. Hotaling, did not make a gift of these shares to the defendant, Richard M. Hotaling.

As stated by the trial judge in reviewing the evidence: "This issue is the pivotal point and vital issue in this case. The plaintiff swears that she never made it; the defendant swears that she did, and, as no other person was present at either of the alleged conversations relating thereto, or upon the occasion when it is claimed the gift was made, the issue of veracity lies directly between mother and son, and this issue must be resolved by a consideration of the actual conduct, writings, declarations, motives, and relations of the parties; the amount and value of the gift; the financial condition of the donor after such gift, and her ability to make it."

In passing upon this point the function of this court is much less complicated than was that of the trial court.

The trial judge was called upon to delicately adjust the balance so as to determine upon which side, in this great mass of conflicting evidence and inference, the preponderance might lie, while upon this appeal our only duty is to ascertain if there was any substantial showing in behalf of the court's finding to give rational support to the conclusion reached.

[1] It may be conceded that the defendant's evidence made a *prima facie* case in his behalf.

The fact was shown that there had been a legal transfer of this stock from Lavinia J. Hotaling to Richard M. Hotaling on the corporate records. It is conceded that the mere fact of the existence of the relationship of parent and child between them does not create that confidential relation which raises a presumption of fraud in a voluntary transfer of property from the parent to the child.

The plaintiff was therefore confronted with a transfer of this stock, regular on its face, which cast the burden upon her to show, in order to avoid the transaction, either that the transfer never operated to invest the ownership of the shares in the defendant, or that if the gift was actually made it was voidable on the ground of fraud or undue influence.

[2] The plaintiff here testified that she never gave this stock to her son, or knowingly transferred her title thereto. If there is any weight to be given to this testimony it will not be disputed under the established rules of law in this state that a finding of the court in accordance with such testimony cannot be disturbed, whatever the views of the appellate court as to the comparative strength of the testimony to the contrary.

It is appellants' contention, however, that the plaintiff's testimony in this connection was so meager, vague, and equivocal, and so inherently improbable as not to be entitled to consideration, and, indeed, did not constitute a denial of the transaction as claimed by defendants. The following is the testimony by question and answer as given by Mrs. Hotaling on this point:

"Q. (Mr. McNab.) Mrs. Hotaling, I show you a certificate dated December 2, 1913, purporting to be a certificate for 2,499 shares, certificate No. 15 in the Hotaling Estate Company, and your signature, in favor of R. M. Hotaling, is this your signature? (Exhibiting signature to the witness.)

"A. Yes, that is my signature all right.

"Q. Do you have any memory, have you any recollection?

"A. Of signing that?

"Q. Have you any recollection of ever signing this certificate?

"A. None whatever.

"Q. Did you ever, at any time, give 2,499 shares of your stock in the Hotaling Estate Company, or any other number of shares, to Richard M. Hotaling, your son, or to anybody else?

"A. Not that I know of—of the Hotaling Estate?

"Q. Of the Hotaling Estate Company?

"A. No.

"Q. Did you ever give any shares to Richard M. Hotaling, your son, or to anybody else, at any time?

"A. No."

Certificate No. 15, in words and figures as follows, was introduced in evidence:

“San Francisco, Cal. Dec. 2, 1913, No. 15.

“This certifies that R. M. Hotaling is entitled to 2499 shares of the capital stock of the Hotaling Estate Company, incorporated Nov. 30, 1904, transferable on the books of the company by endorsement hereon and surrender of this certificate.

(Signed) “C. W. CONLISK, Secretary.

“LAVINIA J. HOTALING, President.”

Corporate seal attached, and indorsed: “R. M. Hotaling.”

“The Court: I suppose it is admitted that that is the signature of the defendant, is it?

“Mr. Dunne: On the back, yes, sir.

“Mr. McNab: Will you let me have the certificate book showing the previous certificate to this?

“Q. Mrs. Hotaling, I show you this signature on the certificate of stock purporting to be Hotaling Estate Company for 2499 shares, in which the figures are written on the upper line and the name ‘R. M. Hotaling’ on the lower line.

“Mr. Dunne: For the purpose of identification, bearing date?

“Mr. McNab: Bearing date Dec. 2, 1913.

“Q. Is that your signature? (Exhibiting certificate of stock to the witness.)

“A. Yes.

“Q. Do you have any recollection—No. 14. I am going to have it read in after—do you have any recollection whatever of ever having signed this certificate?

“A. I have not.

“Q. Mrs. Hotaling, did you ever give this certificate, or any other certificate of any shares of stock in the Hotaling Estate Company to your son, Richard M. Hotaling, at any time?

“A. No.”

The witness then had her attention called to the indorsement of her name on the back of the paper and was asked if she signed it. After considerable quibbling over certain dissimilarities from her ordinary signature, she conceded that it was her signature.



"Q. Well, whether it is your signature or is not your signature, have you any memory of ever having placed your signature on the back of this certificate of stock?

"A. No. I don't in no way, it would be a funny thing for me to give away my stock.

"Q. There is a stub, showing a stub connected with the Certificate No. 1, Dec. 6, 1904, in the Hotaling Estate Co. Is that your signature to the stub? (Exhibiting to the witness.)

"A. Let me look at that 'Lavinia'—I am a little suspicious of that—well, it looks like my signature, 'Lavinia' is written pretty well, better than I generally write it, but, however, let it go, say I signed it.

"Q. Have you any remembrance whatever of having signed this stub that I showed you the signature?

"A. Have I what?

"Q. Have you any remembrance of signing it?

"A. No.

Mr. McNab: Q. I am showing you a certificate dated December 6, 1904, certificate No. 6, purporting to be for 2498 shares, is the name of Lavinia J. Hotaling, showing you the indorsement on the back of that, 'Lavinia J. Hotaling.' Is that yours? (Exhibiting to the witness.)

"A. I am suspicious of the 'Lavinia,' but as I say, all right, say I signed it, the 'Hotaling' looks like my writing, and the 'J,' that is too good, I do not write as even as that 'Lavinia,' that is written exactly the same, let it go, say 'Yes.'

"Q. Have you any remembrance of either having signed the stub of this certificate or the back of this certificate?

"A. Not the slightest remembrance, so it might just as well go I signed it, because they are all signed the same.

"Mr. McNab: Q. Mrs. Hotaling, did you ever give these certificates that I have last shown you, or any other certificates of your shares of stock to the Hotaling Estate Company at any time to your son Richard M. Hotaling?

"A. Not to my knowledge.

"Q. Well, did you ever give them at any time?

"A. No."

The witness further testified that she first learned that Richard Hotaling made any claim to her stock some years later, shortly before the beginning of this action.

The testimony as quoted contains a bare denial by plaintiff that she made any gift or conveyance to her son, Richard, qualified, however, by the admission that the signatures shown her are her signatures, and the repeated statement that she has no recollection of the event, of being shown the documents, of signing her name, or of any conversation between herself and Richard leading up to the transaction.

Assuming that these statements of the witness are credible and were believed by the court, and they evidently were so accepted, they are not lacking in probative force, as appellants assume.

Of course, if this transaction took place, as Richard M. Hotaling testified; if it was preceded by a conversation in which Mrs. Hotaling told Richard that on account of the reckless character and disposition of her younger son, she had made up her mind to turn over all her stock to him, Richard; if she on the day in question went to the office of the corporation, and called upon Richard to produce her certificates that she might make the transfer they had previously talked about, it would be indeed incredible that she could not remember about it. On the other hand, if all that occurred was that on an occasion of her visit to the office, Richard, as the active and responsible manager of the affairs of the company, brought to his mother certain papers and documents and asked her to sign them as the corporation's president and she signed them, as she testified that she was accustomed to sign such corporate papers, at his request and without reading them or having their contents explained, then it would be the most natural thing in the world that she would several years later retain no knowledge or memory of the event or anything connected with it.

Indeed, if it is true, and the trial court evidently accepted her statement to that effect as true in passing upon the sufficiency of this evidence to support the findings, that Mrs. Hotaling actually had no memory at the time of the trial as to the circumstances and conditions under which she attached her name to these papers, it would afford very persuasive evidence that she was not at the time consummating a gift of a million dollars worth of stock to her son. If she was conscious of the fact that she was transferring this stock to Richard Hotaling with the purpose of making a gift of it to him, of course she, being a woman of sound

mind, would have remembered it. If she did not remember it, it doubtless was because no such gift was made. She said she did not give the stock to her son. She said she had no recollection of the circumstances of signing the certificate. The trial court believed her. It is true that there is room for controversy as to the application of some of her averments of want of recollection. They might be open to the construction that she meant to say that she did not remember whether she made a present to Richard of her stock on that day, but in the light of all the evidence it is fairly apparent that what she was testifying to was that she did not give away her stock, that she was not aware of the fact that she was executing such a transfer as the records show, and that she had no recollection whatever as to the circumstances leading up to signing of the papers.

If such was the case, and the court has so found, it of course follows, in the absence of any facts creating an equitable estoppel against her, and there are none, that Richard Hotaling could acquire no beneficial interest in this corporate stock as against his mother.

This conclusion is further supported by evidence sustaining the further finding of the trial court that the personal and business relations between Richard Hotaling and his mother were such as to establish the existence of confidential relations between them which called for the exercise of the strictest good faith on his part, and which would tend to corroborate her testimony that she had no intimate knowledge of the business of the corporation itself; that it was under the management of her son, Richard; that she had implicit confidence in him both as her son and as the managing head of the corporation, and was accustomed to sign all papers pertaining to the corporation at his request and without investigation or knowledge of their contents.

It is unnecessary to go any further than this in defining the confidential relations between Mrs. Hotaling and her son Richard. They were at least such that he could not hold her to a transfer of her stock made inadvertently and without knowledge of what she was doing and without consideration.

This proposition is elementary. Counsel on both sides have ably and with great research compiled the decisions of the courts upon the degrees of confidential relations between

parent and child and the conditions and circumstances under which a conveyance from a parent to the child will be avoided unless shown to have been made freely and voluntarily, with full knowledge of all the facts and after the parent has had independent advice. It is not necessary to apply that rule here in all its strictness. It may be granted that if Mrs. Hotaling made this transfer to Richard, as he testifies that she did, it would constitute a valid executed gift. Though seventy-four years of age, she was a mentally vigorous and competent woman, who evidently looked after her own private interests, and even dominated the affairs of the corporation in matters where she felt herself personally concerned. She was quite capable of forming an independent judgment where her son Richard was concerned, as well as in matters relating to other members of her family. According to the story narrated on the witness-stand by Richard Hotaling, the plaintiff told him one night after her younger son had come home under the influence of liquor from a social function where he had, it appears, made something of a scandal, that she was not going to bother with Fred any longer; that if he was going to conduct himself in that manner and lose everything he had, she was determined that he was not going to lose any more than he now has. She then said, according to this testimony: "Now, Dick, I can rely on you. I have been thinking this thing over, and I want to give you all of my stock in the family estate, and then if Fred makes any trouble he will have you to deal with." "Then," the witness continues, "I said to her, 'Why, now, Mama, why you are excited now; just don't think any more about this.' 'Oh, no,' she said, 'this is not the only time; I have put up with him in this kind of thing for a great many years. He has promised me on many occasions that he would give up drinking and he does not keep his word. . . . My mind is made up, Dick, and I think it is the best thing to do. You know how it was with Anson. When Anson passed away, he had made everything over to Ella, and there was no fuss and there was no trouble. I have a very bad heart, Dick, I get that from mother. You see how my head shakes, and some day I may get one shock too many. Now, I am determined in this thing. I have made up my mind. I think it is the best thing that you should have my stock and I want to give it to you.'"

The witness testifies to more conversation of this nature and says that he advised her to wait awhile; that he was going to Marin County to spend Thanksgiving and when he came back next week they would see about it; that when he returned after Thanksgiving, his mother renewed the topic and reiterated her purpose to give him the stock, and it was finally agreed if she felt that way for her to come to the office the next afternoon and they would fix it up. That she came to the offices of the corporation the afternoon of the following day and said: "I am here, Dick, to fix that matter up and give you my stock." That he at her suggestion then procured the certificates and the transfer was made as heretofore stated, Mrs. Hotaling at his suggestion retaining one share of the two thousand five hundred shares she owned in the corporation to qualify her to remain as the president and a director of the corporation. Mrs. Hotaling at the time owned a considerable amount of other property and it appears was fully aware of her financial condition.

If the facts could be accepted as thus testified to by Richard Hotaling, we are not prepared to say they would not establish a valid and binding gift of the 2,499 shares to the son, Richard. The facts thus narrated would show a deliberate, independent transfer on the part of Mrs. Hotaling, with a full knowledge of all the consequences of her act necessary to make the gift complete and binding.

But the trial court found that this version of the transfer was not true, and unless we can disregard the finding of the court and ignore the testimony of Mrs. Hotaling, together with such evidence as was produced in corroboration of her denials of having made a gift to Richard, the judgment cannot be disturbed for want of proof to support the findings as to the ultimate issue in the case.

It seems scarcely worth while to discuss the other evidence in detail. As we have stated, it is wholly concerned with collateral matters, bearing but indirectly and inferentially upon the primary facts testified to by mother and son. While the facts developed have evidentiary value on one side and the other, they are in sharp conflict both as to their substance and as to their probative effect. The trial court may have gone further than would be justified by the cold print, if it were our province to weigh the evidence, in

accepting all the testimony on behalf of the plaintiff and rejecting all that for defendants, but it had the witness before it, and received the evidence in detail through a trial lasting many days. There were circumstances testified to which give color to Richard Hotaling's story, and witnesses testified to statements made by Mrs. Hotaling in the years subsequent to the transfer which might fairly be construed as admissions of the gift of her stock.

On the other hand, it was shown that Mrs. Hotaling continued to deal with, and in some instances dictate, the affairs of the corporation, as if she were an interested stockholder; and transactions were had and statements made by Richard Hotaling apparently inconsistent with his claim of ownership of his mother's stock.

Subsequent to the alleged gift and transfer of practically all of the plaintiff's interest in the corporation, she is found disputing with Richard as to the retention of certain employees of the company, the management and disposal of some of the corporate property, the manner of conducting the business, in most of which matters Mrs. Hotaling succeeded in having her own way, and in the discussion of which no question was raised as to her having no beneficial rights in the premises. It is conceded that no person besides Richard Hotaling and the plaintiff is claimed to have had any direct knowledge of the transfer of this stock, and whatever indirect evidence was produced as to such a gift consisted of two or three casual conversations by the plaintiff testified to by Ella Hotaling and a Mrs. Sullivan, a former employee in the family, in which Mrs. Hotaling made reference to having divided her property between her sons. It appears that she had given to each of them property other than this stock, and the references to the gifts were too vague and uncertain to include definitely the transfer of the corporate stock. The same indefiniteness and inconclusiveness may be ascribed to a number of oral statements attributed by plaintiff's witnesses to Richard Hotaling, which were construed as admissions that his mother continued to be the owner of her original shares in the corporation.

As conceded by both parties, evidence of oral admissions, particularly where inferential rather than direct and ex-

plicit, is about the most unreliable and uncertain evidence that can be produced.

But on the part of plaintiff there was introduced in evidence certain letters of Richard M. Hotaling written subsequently to the alleged gift, which at least are not subject to the taint of uncertain memory, and which may be fairly held inconsistent with his claim of ownership of substantially the whole of his mother's stock. He refers in one letter, in connection with a reference to his mother, to "a list of the inactive properties that we have in San Francisco as well as some of our outside properties." In another he alludes to his mother being "thoroughly acquainted with the change in the handling of our real estate for it was discussed with her and thoroughly explained." Another, in response to a letter from Mr. McNab calling for a statement and report of certain of the corporate properties to be placed in the hands of Mrs. L. J. Hotaling, states that the report is being made and will be furnished, but that the writer "is very sorry that this request has been made, because I know that Mrs. Hotaling is surrounded by some persons into whose hands it will be just as well that detailed matters connected with our estate should not go." The statement in a letter to Frederick C. Hotaling that "Mother has told me that she is perfectly willing that Hind & Co. should look after our affairs." These quotations are not in themselves of special significance, but covering a period of time and transactions affecting the corporate business, and containing no word in any instance to negative the mother's continued rights in the premises, they were matters which the trial court had a right to weigh in the consideration of the plaintiff's categorical denial that she had made the alleged gift of her stock.

A great volume of the testimony in the trial related to a transaction concerning the disputed right of Richard M. Hotaling to other property consisting of a ranch known as the Sleepy Hollow ranch, in Marin County, and to which he had obtained a conveyance from the corporation.

It had no relation to the stock transfer, and is of such doubtful relevancy, and of so slight evidentiary value, that it does not require discussion.

[3] We are of the opinion that too much importance has been given, and too much irritation developed, over the fact



that much of the evidence for the plaintiff was given by one of the attorneys in her behalf, as a witness in the case. So far as the court is concerned such testimony is to be received and considered, as that of any other witness, in view of the inherent quality of his testimony, his interest in the case, and his appearance on the witness-stand.

[4] The propriety of a lawyer occupying the dual capacity of attorney and witness is purely one of legal ethics largely to be determined by the attorney's own conscience. While it is not a practice to be encouraged, it may often occur that conditions exist in which an attorney cannot justly or fairly withhold from his client either his legal services or his testimony as a witness.

We have scarcely referred in this opinion to the elaborate and resourceful discussion of learned counsel of the questions of law involving confidential relations, and burden and degree of proof, and have but touched upon a review of the voluminous evidence, because of the fact that it is too manifest that any nice distinctions in these matters are foreclosed by the findings of the trial court on the outstanding issue, as to whether or not Mrs. Hotaling ever made or attempted to make a gift of this stock to her son.

[5] The decision of the trial court that there was no act or purpose on the part of plaintiff to so dispose of her rights reduces the question before us to the simplest elements. Was there sufficient evidence to support the finding? We are clearly of the opinion that there was. Had a gift or intent to make a gift been proven, it may be conceded that such transfer could only be set aside on clear and convincing proof of fraud or *mistake*. But the finding here goes to negative the effect of the original transaction and holds that there was no gift.

[6] In supplement to the objection to the sufficiency of the evidence to support the findings, appellants allege certain errors of the trial court in the rejection of evidence offered in behalf of defendants. First: The plaintiff had testified in support of her claim of ignorance of the details of corporate affairs, that to her knowledge she had never seen any stock certificates. In rebuttal of this statement defendants showed that Mrs. Hotaling had owned shares of stock in other corporations. There were also offered in evidence certain dividend checks on this stock that had been re-

ceived by Mrs. Hotaling. These checks were excluded from evidence, and the ruling of the court is assigned as error. In making this ruling the trial judge said: "I admitted in evidence the certificates of stock just referred to as bearing upon the question whether or not this lady had any knowledge, or rather the extent of her knowledge, if any, as to what a certificate of stock was, its appearance and the like. Consequently I don't see how these are relevant and I will sustain the objection." In other words, the court held that familiarity with dividend checks containing an order for the payment of dividends on her stock would not tend to establish any familiarity with the physical aspects or contents of the stock certificate itself, and that was the point to which the evidence was directed. The general familiarity of the plaintiff with corporate shares and the dividends therefrom was abundantly evident and we do not think seriously disputed. In explaining how she may have signed the certificate transferring her stock to Richard Hotaling without knowing what it was, she had made this statement that she did not know what a stock certificate looked like, and her knowledge of dividend checks would throw no light on this point.

[7] Second: Question was raised on the trial whether, after the alleged gift by his mother of her interest in the estate of Richard Hotaling, he had made any provision for her possible future needs. He testified that he had provided for her in a will executed in August, 1914, but that this will had been destroyed. It was then brought out that a new will was made in August, 1918, some two months prior to the beginning of this action. He was asked by plaintiff's counsel if he had made any provision for his mother in this latter will, but, upon the objection of his own counsel that this would be incompetent, he was not permitted to answer. Counsel for plaintiff then demanded the production of the will, but when later it was produced, refused to offer it in evidence. We find nothing to comment upon thus far under this head. Plaintiff's counsel were not required to offer the will in evidence, and defendants' counsel did not do so and are not claiming that it contained anything relevant to the case.

Attention, however, is called to an offer on the part of defendants' counsel to prove the contents of the destroyed

will in explanation of a statement brought out on cross-examination in a letter of Richard Hotaling to his brother Fred, in which it was stated: "My will, as you know, is in your favor. When I die you will get all I possess." This was in apparent contradiction of the testimony that he had provided for his mother in such will. On redirect examination counsel for defendants offered to show, by proving the contents of the lost will, that the will in question left Richard's entire estate to his brother, Fred, in trust to pay the proceeds to his mother during her life, then to Fred during his life, then the entire remainder to the children of the deceased brother.

The court sustained an objection to this proof.

We think this ruling was clearly erroneous if any significance is to be attached to the declaration in the letter that everything had been left to Fred. That declaration raised the implication that the statement in the former testimony, that he had provided for his mother by this will, was untrue, and the proffered proof of the contents of the will would have explained the apparent contradiction in the evidence.

But we fail to see the materiality of the issue thus raised. What bearing does the question as to whether Richard Hotaling made subsequent provision for his mother have upon the question as to whether or not she made him a gift of her corporate stock? It is not claimed by anyone that this was a condition or consideration for the transfer. If it stands upon any foundation whatever, it is upon a purported statement long subsequent to the transfer made by Richard to his mother that he would provide for her every need. At the time of the alleged gift Mrs. Hotaling had ample remaining property in her own right to support her.

The evidence as to the apparently contradictory statements of Richard Hotaling as to the provisions of his will were brought out by plaintiff's counsel without objection, so far as we have been able to discover, but it was a collateral and immaterial issue and not the subject of impeachment. Its remoteness from the main issues of the case, we think, removes it from the class of prejudicial error.

Third: In order to show the obligation to her son, Richard, under which Mrs. Hotaling rested, Richard had

testified that before the division and distribution of the interests in the family estate among the members of the family, which were then operated under an incorporation known as A. P. Hotaling & Co., a plan had been drawn up whereby the stock of the corporation was to be distributed in equal shares to the three sons, the elder son, Anson, since deceased, then being alive, and the mother was to be left out, with some indefinite provision for her support during her lifetime; that when this plan was presented at a family meeting for the purpose of considering it, Richard, as soon as the proposal was made, protested against it, declaring that it was unjust to his mother and that this was the first he had heard of such a scheme. That, as a result, this proposed settlement was abandoned and the mother was given an equal share in the estate with each of the children, which adjustment resulted in her receiving full two thousand five hundred shares in the estate company, afterward incorporated, which is the stock involved in this action. In corroboration of this testimony the defendants offered in evidence certain canceled and unissued certificates of stock in the stock certificate book of the A. P. Hotaling Company showing the preparation of such certificates for issuance in blocks of one-third each, of the entire stock to the three sons, in connection with the alleged settlement, which Richard Hotaling claims to have frustrated.

On objection of plaintiff's counsel, the trial court excluded this evidence. There was no prejudicial error in this ruling. It is not disputed that such a division of the stock was attempted. The plaintiff herself testifies that she was present at the meeting when this proposed settlement was presented. That she indignantly voiced her objection and that the plan was abandoned. The only point in controversy is as to Richard's part in defeating it. These canceled and unissued certificates could throw no light on that proposition. The only evidence as to Richard Hotaling's agency in the matter is his own version, as already referred to, supported, as we remember, by the testimony of another witness as to admissions to the same effect by Mrs. Hotaling, and Mrs. Hotaling's own testimony, in which she agrees with Richard as to the preliminary facts, but gives a somewhat different version as to the nature and extent of his disclaimer and protest.

[8] Fourth: Richard Hotaling was asked, on cross-examination, whether, "in the conduct of the corporation" or "in the various transactions of the business" he ever did anything or said anything either to Mr. McNab, Mr. Richardson, or Mr. Umbsen to inform them, or either of them, that he was the owner of this stock, to which he answered that he had mentioned said matter to none of these excepting to Mr. McNab on January 18, 1918. Upon redirect examination counsel for defendants asked the witness if he knew certain persons, none of whom excepting Ella K. Hotaling appear to have had any connection with the Hotaling family, or the affairs of the parties to this action. He answered that he did know them. The following question was then put to the witness: "I will ask you, Mr. Hotaling, if subsequently to the second day of December, 1913, and during the year 1914 and 1915, you did not inform each and every one of the persons I have just named that your mother had given you her interest in the Hotaling Estate Company." The witness answered in the affirmative, but the answer was stricken out on plaintiff's objection that it was "self-serving, irrelevant, incompetent, and immaterial, and not shown to have been made in the presence of Mrs. Hotaling."

The testimony thus excluded cannot be said to have been properly offered in rebuttal of the matter drawn out on cross-examination. The question on cross-examination was directed to any claim of ownership of the stock, to persons connected with the corporation in matters relating to the transactions of the business.

One of the contentions of the defendants on the trial was that subsequent to the date of the alleged gift the affairs of the corporation were carried on precisely as though Mrs. Hotaling was a party in interest in the corporate affairs and without anything to indicate Richard Hotaling's claim of ownership of this stock. The parties named in the question put on cross-examination were all persons in close relation with the corporate affairs during this period. The persons regarding whom the evidence on redirect examination was excluded, with the exception of Ella Hotaling, who was aligned with the defendants in the action, were strangers to the corporation and its business. Statements made to them

would not constitute a challenge to Mrs. Hotaling's rights as a stockholder.

[9] Such declarations made by a party in his own interest are commonly inadmissible. Exceptions to this rule exist under circumstances where a failure to assert a claim or right may be construed against the party as an implied negation, or where the assertion of such claim at a later date is attributed to conditions and exigencies which have arisen since the transaction in question, which motive would be disproved by showing earlier declarations to the same effect. (*California Elec. L. Co. v. Safe Deposit & Trust Co.*, 145 Cal. 124, [78 Pac. 372]; *People v. Rodley*, 131 Cal. 240, [63 Pac. 351]; *People v. Doyell*, 48 Cal. 85; *Commonwealth v. Jenkins*, 10 Gray, (Mass.), 485; 40 Cyc. 2789.) The declarations here excluded do not purport to have been made to parties or under circumstances to bring them within any of the recognized exceptions to the rule.

If the excluded testimony was offered on the broader ground that it was intended to rebut any implication that may have arisen on the trial that Richard Hotaling had tried to keep secret any claim of ownership of his mother's stock from the time of the transfer, it might be admissible for that purpose, even though not strictly redirect testimony. But in view of the facts that none of the parties communicated with was concerned in the ownership of the stock, or was interested in or hostile to the witness' claim of ownership, and that the evidence but inferentially tends to prove a fact that in itself if proved would only give rise to another inference, the error, if there was such, cannot be given such prejudicial weight as to justify a reversal.

It is true that Ella K. Hotaling, one of the persons named, was a member of the family and a stockholder in the corporation, but she has herself testified to facts showing her understanding that Richard Hotaling owned his mother's stock and is a witness in his behalf. To show further that Richard had declared to her his claim of ownership would aid little in removing the stigma of secrecy, if any such existed.

[10] Fifth: The final exception to the court's rulings on the exclusion of evidence presented in appellants' brief arises on the rejection of a letter written by Fred C. Hotaling in which he confesses to the circulation of certain

slandorous reports concerning Ella K. Hotaling. Appellants claim that this letter, written to the defendant, Richard Hotaling, is relevant and material in explaining Richard Hotaling's unfriendly relations with Fred, and the motive and inducement governing Richard in making certain alleged statements to his mother regarding the recording of the deed to the Sleepy Hollow ranch, which he had held without record for so many years, and in the making of his wills. The unfriendly relations of the two brothers are undisputed. Richard had already testified to the fact of the scurrilous stories circulated by Fred, and to the confession of the latter that he had circulated them, and to the breaking of all relations with Fred. The existence of these facts and conditions are undisputed; indeed, are conceded. The letter in question, though perhaps the best evidence of the fact of confession, was but cumulative. As we have already indicated, the Sleepy Hollow ranch transaction was remote and entirely collateral in relation to the main issue of this case. Any possible application of the acts of Fred Hotaling, either in making or admitting his insinuations against Ella K. Hotaling, was supplied by Richard's uncontradicted testimony as to his understanding of the matter, and does not depend upon Fred's confession. We can see no possible error or prejudice in its exclusion.

As already stated in this opinion, we find in this record on appeal many reasons for putting a more favorable construction upon the defendants' side of this controversy than were indulged by the trial court, but upon a review of the whole case, it is clear that the findings which support the judgment have substantial support in the evidence. And the alleged errors of law which counsel for appellants themselves refer to as "presented for argument's sake and that alone," if they amount to error, do not, "after an examination of the entire cause including the evidence," indicate "a miscarriage of justice."

The judgment is affirmed.

Wilbur, J., Shurtleff, J., Shaw, C. J., and Lennon, J., concurred.

Rehearing denied.

All the Justices concurred.



[L. A. No. 6918. In Bank.—January 5, 1922.]

W. E. McCASLIN, Respondent, v. SOUTHERN PACIFIC  
COMPANY (a Corporation), Appellant.

- [1] **COMMON CARRIERS — CONVERSION OF SHIPMENT — PLEADING — EVIDENCE.**—Where, in an action for the conversion of goods while they were in the possession and under the control of the defendant as a common carrier between the point of shipment and the point of destination of the goods, the complaint alleged that the defendant was a carrier and that it unlawfully and wrongfully sold the goods without the plaintiff's knowledge and contrary to his instructions, the plaintiff could only recover upon proof either that the defendant sustained the relation of carrier of the goods at the time of their conversion, or had so contracted with plaintiff as to be liable for loss by any other carrier or bailee.
- [2] **ID.—TRANSPORTATION OF GOODS BEYOND LINES—LIABILITY—COMMON LAW.**—A common carrier by the acceptance of goods for transportation over its railroad lines to their destination and thence over the connecting lines of other carriers to the destination of the goods does not have imposed upon it by common law any liability as a carrier of such goods beyond the terminal of its own lines.
- [3] **ID.—NONLIABILITY UNDER FEDERAL LAW—CARMACK AMENDMENT — CUMMINGS ACT.**—The Carmack Amendment to the Interstate Commerce Act making initial carriers liable for loss of shipments by connecting carriers did not apply to a shipment whose destination was outside of the United States, and the Cummings Act, which replaced such amendment and had the effect of extending the liability of an initial carrier so as to cover losses upon connecting lines, is not applicable to a foreign shipment made before the enactment.
- [4] **ID.—CONVERSION BY CONNECTING CARRIER—BILL OF LADING—LIMITATION OF LIABILITY OF INITIAL CARRIER.**—Under a bill of lading issued by an initial carrier upon receipt of a shipment of goods to a point beyond the destination of its own lines, no recovery can be had for a conversion of the goods by a connecting carrier, where the instrument expressly limits liability to carriage over its own lines.

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2. Limitation of carrier's undertaking to its own line, notes, 5 Am. St. Rep. 719; 88 Am. St. Rep. 74; 31 L. R. A. (N. S.) 52, 68.

3. Carmack Amendment as affecting state regulations as to stipulations limiting liability of common carriers for loss of or damage to goods, notes, Ann. Cas. 1915B, 80, 92; Ann. Cas. 1917C, 939; 44 L. R. A. (N. S.) 257; 50 L. R. A. (N. S.) 819.

[5] **ID.—ACTION FOR CONVERSION — LIABILITY OF INITIAL CARRIER — THEORY OF NEGLIGENCE — PLEADING.**—In an action against an initial carrier for damages for conversion of goods by a connecting carrier in selling the same for transportation charges after refusal of acceptance by the consignee, the plaintiff cannot recover on the theory that the defendant was negligent in failing to notify the connecting carrier that it held, as alleged in the complaint, an indemnity bond for payment of the freight charges, since such averment was necessary in order to show that the sale was wrongful.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge. Reversed.

The facts are stated in the opinion of the court.

Henry T. Gage and W. I. Gilbert for Appellant.

Nathan Newby and Hugh A. McNary for Respondent.

**RICHARDS, J., *pro tem.***—The appeal is from a judgment in favor of the plaintiff in an action brought by him to recover damages for the loss of a carload of vegetables, delivered to the defendant for shipment to Regina Fruit Company, in the city of Regina, Canada.

The complaint is in form an action for conversion. The plaintiff, after alleging the corporate character of the defendant and that it was a common carrier of freight and passengers, and, after alleging his ownership of the goods in question, proceeded to allege that on or about December 2, 1913, he delivered said carload of vegetables, the same being of the then value of \$568.70, to the defendant to be by it shipped, transported, and delivered to said Regina Fruit Company at said place; that, prior to the time of making said shipment, the plaintiff, being a dealer and shipper of fruit and vegetables, had executed and delivered to the defendant his general indemnity bond, whereby, as a consignor of goods over the lines of said company and other connecting lines in conjunction with the said Southern Pacific Company, he bound himself to the payment of all freight charges which should become due to the said Southern Pacific Company, or any connecting lines over which any shipment made by him should be made and forwarded. It was also alleged in the complaint that it was agreed between the plaintiff

and defendant that the freight on such shipment was to be collected from the said consignee, Regina Fruit Company, and that if the Regina Fruit Company failed or refused to pay such freight, then the same was to be paid by the plaintiff, as provided in the indemnifying bond aforesaid; that said carload of vegetables reached its destination on or about December 15, 1913; that the consignee of said shipment refused to accept the said goods, and the plaintiff was thereupon notified of such refusal, and he immediately began negotiations for the disposal of said goods; that while he was so engaged in negotiating for the disposal of the goods, the defendant unlawfully and wrongfully sold and disposed of the said vegetables without prior, or any, notice to the plaintiff, and without his knowledge and contrary to the will and against the instructions of plaintiff; that plaintiff has demanded said goods, but the defendant has wholly failed and refused to deliver the same or any part thereof to plaintiff, to his damage in the sum of \$568.70, for which sum the plaintiff has filed his claim with the defendant, but which claim has by it been wholly rejected, and said sum, together with interest thereon, remains and is wholly due and unpaid.

The defendant's answer to this complaint consisted of specific denials, based in the main upon want of information and belief, of its various averments. Subsequently the defendant amended its answer by setting forth a further and separate defense, alleging "That at all the times mentioned in plaintiff's complaint, and particularly at all of the times during which said shipment of vegetables therein referred to was being transported and until delivery or disposal thereof at destination, the Carmack Amendment to the Interstate Commerce Act was in force and effect, and that this defendant's liability as a common carrier terminated upon the delivery of said shipment by it to its connecting carrier in Canada, and that the alleged conversion of said shipment, and the damage, if any, sustained by plaintiff, occurred at Regina, Canada, and for which this defendant is in no way liable." The plaintiff also amended his complaint, increasing somewhat the demand for damages, but not otherwise changing its form. The cause went to trial upon the issues as thus made, whereupon evidence was admitted showing without serious conflict that the carload of vegetables

had been delivered by the plaintiff to the defendant at the city of Los Angeles, consigned at first to one Liddicott at Rosevale, California, but subsequently diverted, by the plaintiff's order, to the city of Regina, in the province of Saskatchewan, Dominion of Canada, under a bill of lading for their delivery to the Regina Fruit Company at said place, the freight charges to be collected from the said last-named consignee; provided, that if the said Regina Fruit Company failed or refused to pay such freight and transportation charges, the same would be paid by the plaintiff as provided in the indemnifying bond as referred to in plaintiff's complaint; that the railroad lines of the defendant did not extend into Canada and in consequence said shipment of vegetables was transported beyond the lines of the defendant to its destination by other connecting carriers, the last of which reaching Regina was the Canadian Pacific Railway; that the Regina Fruit Company, upon notice to it from said last-named railway of the arrival of said carload of vegetables, refused to accept same, of which refusal the defendant was immediately notified; that the defendant did not notify the plaintiff of such refusal, but the plaintiff was informed by some outside party that his said consignee had refused to accept said vegetables and he immediately proceeded to make arrangements by wire for the disposal of the same through a firm of brokers at Regina; that the defendant did not notify the Canadian Pacific Railroad that the plaintiff was making such arrangements, nor did it notify the latter railway that it was the holder of a good and sufficient indemnity bond for the payment by plaintiff of the freight and transportation charges on said car of vegetables; that the Canadian Pacific Railway Company, having no notice of these facts, caused the said carload of vegetables to be sold for the freight and transportation charges, amounting to the sum of \$357.50; that the reasonable value of the vegetables in the city of Los Angeles at the time of their said shipment was \$568.70, and the reasonable value thereof in the city of Regina at the time of their arrival there and thereafter during the month of December was \$1,039; that the bill of lading issued by the defendant to the plaintiff at the time of the shipment of said vegetables was in the usual form of bills of lading issued by said defendant under the

interstate commerce regulations in force at said time, and that it had indorsed upon it the following provision:

“Section 2. In issuing this bill of lading, the company agrees to transport only over its own lines, and except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own lines. No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.”

The trial court upon the foregoing facts made its finding to the effect that the defendant was guilty of negligence in failing to notify the Canadian Pacific Railway that it held a good and sufficient indemnity bond from the plaintiff for the payment of the freight and other transportation charges on said carload of vegetables, and also in failing to notify the Canadian Pacific Railway that plaintiff was making arrangements for the sale of said carload of vegetables to other persons, and further found that the defendant had violated its duty as a common carrier and agent of said plaintiff in failing to notify the plaintiff that the carload of vegetables had been rejected by the Regina Fruit Company, and in failing to notify the said Canadian Pacific Railway Company to hold the said carload of vegetables subject to the order of the consignor. The court further found that by reason of the violation of its obligation to the plaintiff as a common carrier, the said plaintiff had been damaged by the loss of said carload of vegetables in the sum of \$568.70, with interest thereon from December 30, 1913, at the rate of seven per cent per annum, no part of which has been paid. Judgment was accordingly rendered and entered for said sum with interest from said day, and from such judgment the defendant prosecutes this appeal.

In discussing the questions presented on this appeal, it is to be noted at the outset that the cause of action, as set forth in the plaintiff's complaint, is one sounding in conversion of the plaintiff's goods, while they were in the possession and under the control of the defendant as a common carrier between the point of shipment and the point of destination of these goods. It is expressly alleged “that said

defendant, together with its connecting lines, was a common carrier of freight and passengers between the said two cities." It is further alleged "that the defendant unlawfully and wrongfully sold and disposed of said goods without prior or any notice to or knowledge of plaintiff, and contrary to the will, and against the instructions of plaintiff." The only breach of duty alleged to have been committed by the defendant is that just above quoted.

[1] Upon such a complaint it would seem to be clear that a recovery by the plaintiff could only be had upon proof either that the defendant, as a matter of law, sustained the relation of a carrier of the plaintiff's goods at the time of their alleged unlawful conversion, or that if it did not stand in this relation at said time, it had so contracted with the plaintiff in relation to the carriage of said goods to their destination as to be liable for whatever wrong or loss was inflicted upon plaintiff by any other carrier or bailee of said goods.

[2] That the defendant by the acceptance of said goods from said plaintiff for transportation over its railroad lines to their destination and thence over the connecting lines of other carriers to the destination of said goods did not have imposed upon it by common law any liability as a carrier of said goods beyond the terminal of its own lines would seem to be well settled. The rule is thus stated in Elliott on Railroads (vol. 4, sec. 1432): "As a general rule no carrier is bound by law to accept and carry goods beyond the terminus of its own lines. In the absence of any agreement, either express or implied, for transportation beyond its own lines, the common law liability of an independent carrier is performed by safely transporting the goods over its own lines and delivering them to the consignee or connecting carrier, as the case may be. If in such case goods are merely to be delivered by the initial carrier for further transportation, the former is considered as a forwarding agent, rather than a carrier, as to such further transportation, and is not liable for the default of subsequent carriers." (See 4 R. C. L., p. 896, and cases cited.) [3] Neither was the defendant under any liability as a carrier for the plaintiff beyond its own lines by any federal statute, defining the rights and liabilities of carriers of interstate commerce beyond the boundaries of the United States. The so-called "Carmack

Amendment'' to the Hepburn Act (34 U. S. Stats. at Large, pt. I, p. 595, [4 Fed. Stats. Ann., 2d ed., pp. 547, 568; U. S. Comp. Stats., secs. 8604a-8604aa]), was in existence at the time of the shipment of the goods in question from a point in the United States to a foreign country, and it has been held that this act was by its terms confined in its application to strictly interstate commerce and was not applicable to a case where the shipment was to a destination outside of the United States. (*Best v. Great Northern Ry.*, 159 Wis. 429, [150 N. W. 484]; *Chicago etc. Co. v. Jewett*, 169 Wis. 102, [171 N. W. 757]; *Hamlen v. Illinois Cent. Ry.*, 212 Fed. 324; *Burke v. Gulf etc. Ry.*, 147 N. Y. Supp. 796.) The Carmack Amendment was subsequently replaced by what is known as the Cummings Act, adopted in March, 1915, [4 Fed. Stats. Ann., 2d ed., p. 506; U. S. Comp. Stats., secs. 8592, 8604a], which did have the effect of extending the liability of the initial carrier so as to cover losses upon connecting lines, but the shipment in question having been made in 1913, does not come within the terms of this act. [4] If, therefore, the defendant was liable to plaintiff as the carrier of his goods, or is responsible for their safekeeping beyond its own lines, that liability must be found in some contract between the defendant and the plaintiff creating it. The first place to look naturally for such an agreement is to the contract of shipment as contained in the bill of lading issued by the defendant upon receipt of the plaintiff's goods. This bill of lading was introduced in evidence and is in the standard form of such contracts, approved by the Interstate Commerce Commission. The provision in said bill of lading, defining and limiting the defendant's liability as a carrier, is to be found in section 2 thereof, above quoted; and in view of the express limitation of the defendant's liability as a carrier of the plaintiff's goods over its own lines, and of the further fact that whatever loss the plaintiff sustained was occasioned by the alleged conversion of said goods by another carrier beyond the defendant's own lines, it would seem to follow that in so far as the plaintiff has counted upon the conversion of its goods by this defendant in the capacity of a carrier of said goods, he would not be entitled to recover damages for said conversion in this form of action; and, in so far as the findings and judgment of the trial court in the plaintiff's favor were predicated upon the



existence of any such liability, the trial court was clearly in error. [5] The plaintiff, however, seeks to sustain this judgment upon the ground that the trial court has found that the defendant was guilty of negligence in the specified respects above referred to in our *résumé* of the findings of fact. It would seem to be a sufficient answer to this contention to point to the fact that this is not an action for damages based upon negligence. It is simply an action for damages for conversion. The defendant is sued as a carrier wrongfully converting the plaintiff's goods to its own use. The allegation in the plaintiff's complaint that the defendant at the time of such conversion held the plaintiff's indemnity bond guaranteeing the payment of the freight charges upon said goods in the event of the consignee's refusal to receive or pay for the same was a necessary averment in order to the showing that the defendant's alleged sale of said goods to pay the transportation charges thereon was a wrongful act. There is no other alleged breach of duty on the part of said defendant pleaded, or attempted to be pleaded, in plaintiff's complaint. The defendant's answer consisted simply in denials of the plaintiff's averments, with the added defense by way of amendment thereto, setting forth that its liability as a carrier terminated, under the Carmack Amendment, with the delivery of said goods to connecting carriers beyond its own lines. Upon the issues as thus made up, the trial court proceeded to make findings as to the defendant's liability for the conversion of said goods as the carrier thereof, and also as to the defendant's liability for negligence in the respects above set forth. In so far as such findings refer to the defendant's liability as a carrier for the conversion of said goods, they are entirely unjustified by the evidence in the case; and in so far as said findings undertake to hold said defendant guilty of negligence, they are entirely beyond the issues in the case, and hence upon either ground could not have been made the basis of a judgment in plaintiff's favor.

At the close of the plaintiff's case the defendant made a motion for a nonsuit, specifying as one of the grounds thereof that the suit being one for conversion, no cause of action against the defendant had been shown. This motion should have been granted. The motion of the defendant for a new trial was specifically made upon the ground that the

evidence was insufficient to show any liability for loss occurring beyond its own lines. This motion should also have been granted. Both of these motions were denied by the trial court, and for these errors the judgment is reversed.

Wilbur, J., Sloane, J., Shurtleff, J., Lennon, J., Waste, J., and Shaw, C. J., concurred.

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[L. A. No. 6937. In Bank.—January 5, 1922.]

W. W. FRAZIER, Respondent, v. V. W. DAVID et al.,  
Appellants.

[1] PROMISSORY NOTE—NONPAYMENT—SUFFICIENCY OF EVIDENCE.—

In this action to recover on a promissory note executed in renewal of one about to become barred by the statute of limitations, wherein the only question was whether or not the original note had been paid, the finding that the obligation had not been discharged is held to be sufficiently supported by the testimony in the record, which includes evidence of the payment of interest regularly for several years on the renewal note.

[2] APPEAL—RULING ON EVIDENCE—REVIEW—INSUFFICIENT ARGUMENT.

Alleged error in refusing a motion to strike out testimony of a witness will not be considered where the only argument in support of the contention is a mere reference thereto in the brief followed by the assertion that no citation of authority is required to establish the error.

APPEAL from a judgment of the Superior Court of Kern County. T. N. Harvey, Judge. Affirmed.

The facts are stated in the opinion of the court.

Kaye, Siemon & Abel and Kaye & Siemon for Appellants.

Wiley & Lambert, J. W. Wiley and R. B. Lambert for Respondent.

WASTE, J.—The plaintiff brought this action to recover on a promissory note for the sum of \$1,337.10 executed in renewal of one about to become barred by the statute of limitations. He recovered judgment for the amount of the

note, unpaid interest and costs, and the defendants have appealed.

The original transaction between these parties grew out of the purchase of a tract of land belonging to the Kern County Land Company by the defendant V. W. David. Roland Greene held a contract of purchase of the land, which he had assigned to the plaintiff as security for the payment of a promissory note for the sum of one thousand six hundred dollars. Greene sold his interest in the contract and in the land, and in certain personal property to V. W. David for the sum of six thousand dollars. That sum was agreed to be paid in several items, one of which was a promissory note for one thousand three hundred dollars, executed by the defendant to plaintiff, and another a promissory note for one thousand six hundred dollars, also executed to the plaintiff by V. W. David and Roland Greene. The note for one thousand three hundred dollars not being paid, and the statute of limitations being about to run against its collection, the defendants executed the note here sued upon, and delivered it to the plaintiff. There was at that time some contention on the part of the defendants that the old note had been paid, and the renewal note was executed with the understanding and agreement between the parties that it was subject to any defense which might be asserted by the defendants to the original obligation. In due time the plaintiff brought this action to enforce payment. The only question in the case was whether or not the note had been paid. There was a very decided conflict in the evidence on that point and the lower court found that the obligation had not been discharged. It entered judgment for the plaintiff accordingly.

[1] We find no reason for disturbing the judgment of the lower court. There is testimony in the record, including evidence of the fact that for several years after its execution the defendants regularly paid the interest on the renewal note, which sufficiently supports the decision below. The record of the examination of the witnesses is not as clear as it might be, but the findings are full and explicit, and appear to correctly disclose the nature of the whole transaction between the parties.

The appellants complain of certain rulings of the trial court relating to the admission of evidence. The objections

are more technical than effective. The one most urgently stressed concerns the testimony of the witness J. W. Wiley, a witness for the plaintiff. V. W. David and Roland Greene secured a discharge from the one thousand six hundred dollar note held by the plaintiff by the execution of certain quitclaim deeds. The defendants claimed that the one thousand three hundred dollar note here in suit was settled and paid by the same transaction. Mr. Wiley, the attorney who arranged the details of the settlement, was called as a witness by the plaintiff, and testified as to what took place in his office. On cross-examination by appellants' counsel he was asked if "both these men" (Mr. David and Mr. Greene) were in his office at the same time. His answer was: "If I testify they were together and reached an agreement with them, I wouldn't be positive about that, but I know that I went into the matter with each of them and the only thing to be settled was that they were giving these quitclaim deeds in consideration of the one thousand six hundred dollar note of which Mr. Frazier took the assignment." Appellants' counsel asked that the answer be stricken out on the ground that it was the statement of a conclusion of the witness. The motion was denied. Appellants assign the ruling of the court as prejudicial error, arguing that the "conclusion" of the witness "that the only thing to be settled," by the giving of the quitclaim deeds, was the one thousand six hundred dollar note, is the only evidence in the record to the effect that the one thousand three hundred dollars was not paid, and that, consequently, it must follow that the trial court decided the case in favor of the respondent on this answer alone. We do not think it is necessary to discuss the question whether or not the portion of the answer objected to was or was not the statement of a conclusion. If a conclusion, it was the only one that could be reached, and the fact remains that it was a repetition of what the witness had already testified to, and no conceivable harm could have resulted to appellants by the refusal of the court to strike it out. (*People v. Hatch*, 163 Cal. 368-378, [125 Pac. 907].) Laying the answer aside from all consideration, the evidence in the case supports the finding and conclusion of the lower court.

On the cross-examination of the witness Wiley, it developed that at the time of the settlement arrived at between

the plaintiff, V. W. David, and Roland Greene, Mr. Wiley prepared some sort of an instrument in writing. Counsel for appellants thereupon moved to strike out all of Wiley's testimony pertaining to the subject of the settlement as not being the best evidence. The motion was denied. It was not made to appear then, or now, what was the nature of the writing, whether it embodied the terms of the agreement or was signed by the parties. Neither does it appear that the witness had testified to the contents of the writing. On the face of the record the ruling of the trial court was correct. [2] Furthermore, the only argument in appellants' brief in support of the contention that the ruling was erroneous is a reference to the incident followed by the assertion "it requires no citation of authorities to establish the error." Points thus made will not be considered.

The judgment is affirmed.

Richards, J., *pro tem.*, Lennon, J., Shurtleff J., Shaw, C. J., Sloane, J., and Wilbur, J., concurred.

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[S. F. No. 9114. In Bank.—January 5, 1922.]

J. MOREY, Respondent, v. A. PALADINI, Appellant.

- [1] **APPEAL—REQUEST FOR PREPARATION OF TRANSCRIPT—RELIEF FROM DEFAULT.**—Where on the hearing of a motion to dismiss an appeal from a judgment upon the ground that no written request for a transcript of the record, as required by section 953a of the Code of Civil Procedure, had been filed, it appeared that a transcript had been prepared without such request and certified to by the trial judge subject to the qualification that no request for its preparation had been made, the appellate court, having acquired jurisdiction of the appeal by the notice of appeal and undertaking, properly continued the motion to permit the appellant to apply to the trial court for relief under section 473 of such code, and where such relief was granted, the motion to dismiss the appeal was properly denied.
- [2] **CONTRACT—VOID CONTRACT.**—A void contract, a contract against public policy or against the mandate of a statute may not be made the foundation of any action, either in law or in equity.
- [3] **ID.—ILLEGALITY—INQUIRY BY COURT.**—When the court discovers a fact which indicates that a contract is illegal and ought

not to be enforced, it will, of its own motion, instigate an inquiry in relation thereto.

- [4] **MONOPOLY—DELIVERY OF LOBSTERS FROM MEXICAN WATERS—EXCLUSIVE RIGHT OF SALE.**—A contract to deliver lobsters in this state from Mexican waters during the season when under the fish and game laws of this state no lobsters may be taken in California waters, and giving the purchaser the exclusive right of sale of such lobsters in this state north of parallel 36 degrees north latitude, is illegal as being in violation of the Sherman anti-trust law and section 1673 of the Civil Code.
- [5] **ID.—INVALIDITY OF AGREEMENT—DEPRIVATION OF ADVANTAGES OF FREE COMPETITION.**—An agreement which has some direct and immediate effect upon interstate commerce is within the inhibition of the Sherman Anti-Trust Act, and it is not essential that the result of the contract should be a complete monopoly in order to vitiate the agreement, but it is sufficient if it really tends to that end and deprives the public of the advantages which flow from free competition.
- [6] **CONTRACT—PARTIAL RESTRAINT OF TRADE—CONSTRUCTION OF CODE.** Section 1673 of the Civil Code makes no exception in favor of contracts only in partial restraint of trade.
- [7] **ID.—CONTRACT IN RESTRAINT OF TRADE—EVIDENCE—INTENTION OF PARTIES.**—In an action to recover damages for breach of a contract for the delivery in this state of lobsters from Mexican waters during the closed season, evidence of the intention of the parties as to the exclusive control and monopoly of the trade by the purchaser was admissible to show that the contract was one in restraint of trade.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George H. Cabaniss, Judge. Reversed.

The facts are stated in the opinion of the court.

Hoefler, Cook & Snyder for Appellant.

Wm. H. Chapman for Respondent.

WASTE, J.—This action is one brought to recover damages for the breach of a contract. Plaintiff had judgment

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4. Contracts in restraint of trade as affected by modern anti-trust acts, notes, 9 L. R. A. (N. S.) 446; L. R. A. 1917A, 379.

7. Admissibility of parol evidence to show contract in restraint of trade, note, 16 Ann. Cas. 391.

and the defendant has appealed. After final judgment the trial court made an order relieving the defendant from his default, and failure to file the notice and request for transcript required by the provisions of section 953a of the Code of Civil Procedure. The respondent has appealed from that order and has presented the questions thus raised in a motion to dismiss the appeal of the defendant.

[1] The facts germane to the preliminary motion and appeal are: Judgment was entered in favor of the plaintiff and against the defendant on February 4, 1919. On February 10th the defendant filed his notice of intention to move for a new trial, which motion was made and denied on February 28th. The defendant gave notice of appeal from the judgment, which was filed March 6th. During the proceedings on motion for a new trial the court reporter had made and delivered to the defendant a transcript of the testimony in the case. Upon the denial of the motion the defendant handed back the transcript to the reporter and orally requested him to also prepare the clerk's transcript and to file both transcripts with the clerk of the superior court. This the reporter did, although no such written notice and request for such transcript had been given to him, or to the clerk, as required by the provisions of section 953a of the Code of Civil Procedure. Thereafter, and on April 12th, the plaintiff moved the trial court for an order disapproving and declining to certify to the truth and correctness of the reporter's transcript, upon the ground that the defendant had failed to file with the clerk of the court any written request for the preparation of such transcript, as required by the above section of the code. Upon the hearing of that motion, the trial court made an order refusing to certify to the reporter's transcript on said ground, but later, and on the seventeenth day of June, as appears from the transcript filed in this court upon the appeal from the judgment, the court did append to the transcript its certificate to the correctness of the same. In so doing it also found and certified that there had never been any request to cause said transcript to be prepared in conformity with the requirements of the code. Thereupon the plaintiff moved the supreme court for an order dismissing the appeal, upon the ground that no notice requesting a transcript of the record, such as is required by section 953a of the Code



of Civil Procedure, had ever been given. Upon the hearing of the motion it was suggested by the supreme court that the defendant should apply to the superior court for relief, under the provisions of section 473 of the Code of Civil Procedure, and the motion to dismiss the appeal was continued to allow the defendant an opportunity to make such application. Thereafter the defendant filed in the superior court a notice of motion to be relieved from his failure to file the request for the transcript, accompanying his notice with affidavits intended to bring the matter within the provisions of said section 473. Upon the hearing of said motion the superior court made an order permitting the defendant to file the request for the transcription of the record, and relieved him from the effect of his failure to file the same at an earlier date upon the ground of mistake, inadvertence, surprise, and excusable neglect. A certified copy of the order was filed in the supreme court on September 3, 1919, the cause having been thereafter transferred to the district court of appeal for the first appellate district, division one, for hearing and determination. That court first considered the question presented by the foregoing facts, and, speaking through Mr. Justice Richards, said:

“It is conceded that the defendant’s notice of appeal from the judgment herein was duly given and that a timely and proper undertaking on appeal was duly filed. This being so, the supreme court thus acquired jurisdiction to hear and determine the appeal from the judgment. The preparation and filing of a proper record upon which said appeal should be heard was a matter of after-consideration, and was one which in most cases still required action on the part of the trial court or of the judge thereof, notwithstanding the taking and perfection of the appeal. That portion of section 953a of the Code of Civil Procedure which refers to the request of the appellant for the preparation and filing with the clerk of the trial court of the transcript has reference to such subsequent proceedings in the trial court as shall result in the preparation and proper certification of the transcript which is to be used upon the appeal, and hence all of these matters are matters entirely within the jurisdiction of the trial court, notwithstanding the taking of such appeal, and are not matters which affect the jurisdiction of the supreme court to hear and determine the

appeal. This being so, we are of the opinion that when the motion to dismiss the appeal from the judgment in this case was presented to the supreme court, based as it was upon the ground that no such written request for a transcript as is required by the provisions of section 953a of the Code of Civil Procedure had ever been filed with the clerk of the trial court, the suggestion of the supreme court that the appellant's remedy for such defect or default was by way of an application for relief made to the trial court was in all respects a proper and timely suggestion; and that the appellant in acting thereon was pursuing the only method which was open to him for remedying his defective record; and that the trial court, upon his motion for such relief under the provisions of section 473 of the Code of Civil Procedure, had jurisdiction, upon a proper showing, to grant him such relief.

"The showing which the defendant there made, supported as it was by affidavits, was deemed sufficient by the trial court to entitle the defendant to the relief asked; and since the granting of such relief was within the powers of the trial court, and since its order made in that behalf enables this court to hear and dispose of the appeal from the judgment herein upon its merits, we shall not inquire too closely into the efficiency of the affidavits presented to the trial court upon the hearing of said motion. The record, as thus finally made up, is sufficient in form to satisfy the requirements of the statute; and this being so we are of the opinion that the motion to dismiss the appeal from the judgment should be denied, and that the order of the trial court permitting the defendant to amend his record in the respect indicated should be affirmed. It is so ordered."

We approve and adopt the foregoing conclusion of the district court of appeal.

This brings us to a determination of the merits of the appeal from the judgment. The facts necessary to a complete understanding of that matter may also be gleaned from the clear and succinct statement of Mr. Justice Richards:

"The action was one brought to recover damages for the breach of a contract entered into between one W. E. Zander, plaintiff's assignor, and the defendant, by the terms of which said Zander agreed to deliver to the defendant, f. o. b. San

Diego, live lobsters at seventeen cents per pound, and boiled lobsters at nineteen cents per pound, to the extent of five tons per week, from the date of said agreement, to wit, April 2, 1917, to October 15, 1917, to be paid for upon presentation of shipping receipts showing that the goods were received in good order by the transportation company. The agreement contained a clause to the effect that the defendant should have 'the exclusive right to sell these lobsters in California, north of parallel 36 deg. north latitude, and in the states of Oregon, Washington and Nevada.' The defendant received certain shipments of these lobsters between April 2 and May 15, 1917, but on or about the latter date refused to order or receive or accept any further shipments of said lobsters or to further comply with his said agreement, to the plaintiff's damage, according to the averments of the complaint, in the sum of \$5,579.41. The defendant in his answer, while admitting the making of said agreement, made certain denials as to his refusal to accept said lobsters under said agreement, and also as to the profit which would have accrued to the plaintiff or his assignor as a result of the keeping of said agreement. In addition to these denials the defendant filed an amendment to his answer in which he affirmatively averred that at the time of entering into said contract the said W. E. Zander represented to defendant that he was the sole agent for a certain fisheries company at San Diego, California, of which said company one M. Kondo was the manager, and that said fisheries company would control the entire supply of lobsters which could be shipped into California from Mexican waters during the term of said contract, and that if said defendant would agree to take the number of tons of said lobsters per week from said Zander, during said time, the said Zander or the said fisheries company would supply no lobsters during said period to any other person or persons north of the thirty-sixth parallel, and that the defendant would have the exclusive right to sell such lobsters in the territory named in said contract north of said parallel of latitude. He further alleges that he relied upon said representations in entering into said contract, but that he at no time received or had the exclusive right to sell said lobsters north of said parallel, nor did the said Zander live up to or perform his part of the agreement in that regard, and for that

reason said defendant refused to order or receive any lobsters from said Zander after the fifteenth day of May, 1917."

Upon the issues as thus made up the cause proceeded to trial, and upon such trial plaintiff's assignor, Zander, testified to an agreement between himself and the fisheries company represented by said Kondo, by which Zander was to receive the lobsters, which in turn he was to sell to the defendant. He testified also that so far as he, Kondo, and the fisheries company were concerned, it was understood that during the pendency of the contract Kondo would not ship lobsters into the territory, and consequently they did not, nor did either of them, sell or supply lobsters to any other person than said defendant for delivery or use north of the thirty-sixth parallel of latitude; that he deemed himself obligated not to sell lobsters to any other parties than the defendant in that territory. There was some testimony offered on behalf of the defendant to the effect that the fisheries company violated this understanding.

Upon the submission of the cause findings were waived, and the court rendered judgment in plaintiff's favor for the sum of four thousand five hundred dollars and costs. From such judgment the defendant has prosecuted this appeal.

The appellant in his reply brief makes for the first time the contention that the contract, upon which the plaintiff seeks to recover, is illegal and void for the reason that it is such a contract in restraint of trade as would constitute a violation of the terms of the Sherman Anti-Trust Act. The respondent objects to a consideration of the point upon the ground that objection comes too late. [2] But a void contract, a contract against public policy or against the mandate of the statute, may not be made the foundation of any action either in law or in equity. (*Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387-390, [9 Am. St. Rep. 211, 18 Pac. 391]; *Estate of Groome*, 94 Cal. 69-72, [29 Pac. 487]; *Chateau v. Singla*, 114 Cal. 91-94, [55 Am. St. Rep. 63, 33 L. R. A. 750, 45 Pac. 1015].) As the appellant comes now into court pleading that he has violated the law and is seeking relief based upon his own unlawful acts, respondent contends that the court should leave him where it finds him. But neither the silence nor the consent of the parties justifies the court in retaining jurisdiction of such

an action. (*Ball v. Putnam*, 123 Cal. 134-140, [55 Pac. 773].) Anyone sued upon a contract may set up a defense that it is a violation of an act of Congress, and if it is found to be so, that fact will constitute a good defense to the action. (*Bement v. National Harrow Co.*, 186 U. S. 70-88, [46 L. Ed. 1058, 22 Sup. Ct. Rep. 747, see, also, Rose's U. S. Notes].) The burden ordinarily rests upon the party asserting the invalidity of the contract to show how and why it is unlawful (*Harbison-Walker Co. v. Stanton*, 227 Pa. St. 55-63, [75 Atl. 988]), and, as a general rule, cases will not be reversed upon points which the respondent has not had an opportunity to discuss, but in cases of this kind it matters not that no objection is made by either party. [3] When the court discovers a fact which indicates that the contract is illegal and ought not to be enforced, it will, of its own motion, instigate an inquiry in relation thereto. (*Kreamer v. Earl*, 91 Cal. 112-118, 27 Pac. 735]; *Pacific Wharf & Storage Co. v. Standard American Dredging Co.*, 184 Cal. 21, [192 Pac. 847].) In this case, however, appellant raised the objection as to the invalidity of the contract in his closing brief in the district court of appeal, and the point was discussed by both parties to the appeal in the petition and answer on application for hearing in this court.

The contract entered into by the parties to this controversy is contained in two written documents reading as follows:

“San Francisco, April 2, 1917.

“A. Paladini,

“San Francisco, Cal.

“Dear Sir:

“I agree to deliver to you f. o. b. San Diego live lobsters at seventeen (17) cents per pound, and boiled lobsters at nineteen (19) cents per pound, and will agree to deliver to you up to five tons per week, from date to October 15th, 1917, subject to weather conditions and run of lobsters.

“You are to have the exclusive right to sell these lobsters in California north of parallel 36 degrees north latitude, and in the states of Oregon, Washington and Nevada.

“This is contingent upon your agreeing to take at least four tons of lobsters a week from me on these terms. The payments to be made upon presentation to you of shipping

receipts showing that goods were received in good order by the transportation company.

“Yours truly,  
“W. E. ZANDER.”

“San Francisco, April 2, 1917.

“W. E. Zander,  
“San Francisco, Cal.

“Dear Sir:

“I agree to take from you or your shipper at least four tons of lobsters a week from date to October 15th, 1917, in lots of boiled and live lobsters as I shall require, at the price quoted to me in your letter of this date, and on the terms and conditions therein contained. I am to have the exclusive right to sell the lobsters in California north of parallel 36 degrees north latitude, and also in the states of Oregon, Washington and Nevada.

“Yours truly,  
“A. PALADINI.”

During the year 1917 the defendant was engaged in the fish trade in San Francisco. Part of his business consisted in buying and selling lobsters. At that time, as now, under the fish and game laws of the state the months from March 1st to October 14th constituted a closed season during which no lobsters may be taken in California, or in waters lying south for a distance of ten miles from the international boundary line between the United States and Mexico, extended westerly in the Pacific Ocean. (Pen. Code, sec. 628.) W. E. Zander, plaintiff's assignor, had contracts with fishing companies operating in Mexican waters south of the prescribed boundary line. He entered into the foregoing contract with appellant, and supplied the lobsters under its terms until the latter part of May, or first part of June, when the appellant refused to accept any further shipments upon the ground that, according to Zander's testimony, the market was overstocked and he could not sell them as fast as they were to be delivered under the contract. The evidence for the appellant was that he refused the shipments because Zander refused to stop the fisheries companies from selling lobsters to other persons in his exclusive territory.

Whatever may have been the reason for appellant refusing to go forward in the performance of the agreement,

it seems to be conclusively established that in the inception of the transaction it was contemplated by the parties that the contract was one which would result in at least a partial restraint of trade. In that connection it appears that Zander obtained from the companies supplying him the exclusive right to sell lobsters in the northern two-thirds of California and in the states of Oregon, Washington, and Nevada. He testified that under his agreement with appellant he was obligated not to, and did not, sell any lobsters in that territory to anyone else than the defendant, and that the fisheries company understood, and were bound by, his contract. The evidence for the appellant is to the same effect, but went further and tended to establish a breach of this agreement on the part of the fisheries companies. The plain terms of the contract itself confirm the intent of the parties to prevent either Zander or the parties supplying him from engaging in the business of selling lobsters to anyone but appellant within the specified territory. There can be no escape from the conclusion that underlying the agreement, and as part of the consideration for the contract, was the purpose of putting it into the power of the appellant to control the lobster market within the limits of the states mentioned, so far as lay within the power of Zander and the fisheries companies, by restraining themselves from exercising their own lawful business of supplying the market generally. The result would tend toward a monopoly of the trade in appellant and a restriction of the trade of the other parties to the contract. [4] We think the contract is illegal, not only as being in violation of the federal statute (Sherman anti-trust law), but also as being contrary to the provisions of our own code section, which provides that every contract by which one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than relating to exceptions in favor of sales of goodwill and in favor of partnership arrangements, is to that extent void. (Civ. Code, sec. 1673.) This last objection to the contract was not raised by either party, but it suggests itself so logically in relation to the transaction that we have considered it in connection with the point raised by the appellant.

The Sherman Anti-trust Act, by the first section, declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce



among the several states, or with foreign nations, is . . . illegal." (26 U. S. Stats. at Large, 209 [7 Fed. Stats. Ann., p. 336; U. S. Comp. Stats. 1918, Compact ed., sec. 8820].) The act was passed for the purpose of protecting trade and commerce among the several states, or with foreign nations, from unlawful restraints and monopolies. [5] An agreement which has some direct and immediate effect upon interstate commerce is within the inhibition of the statute. (*Standard Oil Co. v. United States*, 221 U. S. 1-66, [Ann. Cas. 1912D, 734, 34 L. R. A. (N. S.) 834, 55 L. Ed. 619, 31 Sup. Ct. Rep. 502].) It is not essential that the result of the contract should be a complete monopoly in order to vitiate the agreement. It is sufficient if it really tends to that end and deprives the public of the advantages which flow from free competition. (*United States v. Knight Co.*, 156 U. S. 1-16, [39 L. Ed. 325, 15 Sup. Ct. Rep. 249, see, also, Rose's U. S. Notes].) The effect of the contract at bar may be well understood in view of the fact that its duration was only for the closed season for lobsters in the state during which the supply for the trade must of necessity come from an outside source. It seems to us to be very plain that the agreement was intended to effect a virtual monopoly of the lobster trade in the central and northern portions of this state, and so far as shipments to Oregon, Washington, and Nevada were concerned. It was, therefore, within the provisions of the federal act. (*Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211-241, [44 L. Ed. 136, 20 Sup. Ct. Rep. 96].) So far as our own statute is material, we think argument on the question is concluded by the decision of this court in *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, [9 Am. St. Rep. 211, 18 Pac. 391], which approved and followed *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558, [23 Am. Rep. 190]. The case had to do with a combination among manufacturers of lumber, limiting the amount to be manufactured, and giving the plaintiff in the action control of the supply for one year within certain territory. The action was one to recover damages for a breach of the agreement. The trial court gave judgment for the defendants. In affirming the judgment this court said:

"Plaintiff had an undoubted right to purchase any or all of the lumber it chose, and to sell at such prices and places

as it saw fit, but when as a condition of purchase it bound its vendor not to sell to others under a penalty, it transcended a rule the adoption of which has been dictated by the experience and wisdom of ages as essential to the best interests of the community, and as necessary to the protection alike of individuals and legitimate trade.

“With the results naturally flowing from the laws of demand and supply, the courts have nothing to do, but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto.”

The desire and the intention of the parties to secure to defendant, so far as possible, a monopoly of the lobster business in the selected territory, and the consequent covenant in restraint of the trade, entered so fundamentally into the inception and consideration for the transaction as to render the terms of the contract nonseverable, and it is wholly void. (*Santa Clara Valley Mill & Lumber Co. v. Hayes, supra*, p. 393; *Arnot v. Pittston & Elmira Coal Co., supra*; *Prost v. More*, 40 Cal. 347.) Whether or not the defendant obtained what he sought, an entire monopoly of the trade, is immaterial. [6] The statute (Civ. Code, sec. 1673) makes no exception in favor of contracts only in partial restraint of trade. (*Chamberlain v. Augustine*, 172 Cal. 285–288, [156 Pac. 479].) That the covenants of the contract are illegal as being in restraint of trade, and against the express mandate of the law of the United States and of this state, we entertain no doubt. (*Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115–118, [109 Am. St. Rep. 114, 81 Pac. 416].)

[7] The appellant offered to show by parol testimony that, under the terms of the contract, it was meant by the parties to the agreement and was intended that he should have the exclusive right to sell lobsters within the restricted territory; that at the time the contract was made Zander represented to him that the M. Kondo Fisheries Company and M. Kondo would control the entire supply of lobsters which could be shipped into California from Mexican waters, thus assuring appellant the exclusive control and a monopoly of the lobster trade on the Pacific Coast. The court excluded the evidence. Appellant now contends that it was

admissible upon the ground, first, under the general rules that ambiguities in written contracts may be explained by parol, and, second, to show that the contract was illegal as being one in restraint of trade. As to the first of these grounds, the only one assigned in the trial court, we think the evidence was properly excluded. On this point the district court of appeal correctly held that the "only exclusive right which the defendant obtained under the terms of this contract was one which was exclusive only so far as it bound the other party to the contract, and possibly also the fisheries company, not to ship or sell lobsters in said territory in competition with the defendant; and, as we have seen, the evidence showed that the contract was kept by the plaintiff's assignor in this regard. The contention of the appellant that the seller of the product bound himself and the company from which he purchased said lobsters to see to it that no other persons whatever shipped or sold lobsters within the specified territory in competition with the appellant would be a strained construction, to which the language of said contract taken in its ordinary signification is not susceptible; and the trial court, therefore, committed no error in refusing to the defendant the right to introduce oral evidence which would have the effect of varying and contradicting the terms of the written agreement." On the second ground suggested, however, for the first time on this appeal, the evidence was admissible in support of appellant's offer to show that the contract was one in restraint of trade. (*Buffendeau v. Brooks*, 28 Cal. 642; *Benicia Agricultural Works v. Estes*, 3 Cal. Unrep. 855, [32 Pac. 938, 940]; *Daw v. Niles*, 104 Cal. 106-118, [37 Pac. 876]; *McMullen v. Hoffman*, 174 U. S. 639, [43 L. Ed. 1117, 19 Sup. Ct. Rep. 839, see, also, Rose's U. S. Notes].) The rule is thus stated in 3 Williston on Contracts, section 1753, page 3060: "Parol evidence is always competent to show that a written contract, though lawful on its face, was illegal or part of an illegal transaction; and illegality if serious need not be pleaded or urged to enable the court to act upon it." The evidence was not offered for that purpose and the lower court did not have the point in mind when ruling on its admissibility. Consequently we would not be justified in reversing the judgment on this ground alone, for, as already pointed out, sufficient evidence was presented to show the

nature of the contract. The additional testimony offered would merely serve to emphasize the point.

The appellant contends that there is no testimony as to the market value of the lobsters at the time of delivery at San Diego under the contract, and that therefore the evidence is insufficient to support the judgment fixing the amount of damages suffered by the plaintiff. The respondent's first reply to the contention is that the denials in that respect, contained in the answer, are framed in the objectionable form of the negative pregnant, which raised no issue. Assuming that to be so, the cause proceeded to trial upon the theory that the issue had been properly tendered, and respondent's objection should not now be considered. The contract called for delivery f. o. b. San Diego. Considerable evidence was presented by the plaintiff as to the cost of lobsters to him during the time the contract was being performed by the appellant, and as to what would have been their cost during the entire term of the agreement had the appellant on his part continued to perform. No objection was offered to this testimony. Under section 3311 of the Civil Code the measure of damages suffered by the respondent was "the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller," and it has been decided by this court that under similar circumstances the value to the plaintiff for the purpose of fulfilling his agreement to sell personal property would be, *prima facie*, the cost thereof to him. (*Thompson v. Hamilton Motor Co.*, 170 Cal. 737-739, [Ann. Cas. 1917A, 677, 151 Pac. 122].)

The judgment is reversed.

Wilbur, J., Lennon, J., Sloane, J., Shurtleff, J., and Shaw, C. J., concurred.

Rehearing denied.

All the Justices concurred.

[L. A. No. 6246. In Bank.—January 5, 1922.]

FLORENCE M. BUDD, Respondent, v. IDA ALYS MORGAN, Appellant.

- [1] **ALIENATION OF AFFECTIONS—MARRIAGE—EVIDENCE.**—In an action by a wife for the alienation of the affections of her husband, a *prima facie* case of the existence of the marriage relationship is sufficiently made out by the testimony of the wife as to the marriage and that they had subsequent thereto deported themselves as husband and wife.
- [2] **MARRIAGE—EVIDENCE—CONSTRUCTION OF CODE.**—The intent of section 57 of the Civil Code, providing that consent to marriage and a solemnization thereof may be proved under the same general rules of evidence as facts proved in other cases, was to enable parties to or persons present at the solemnization of a marriage to testify to the facts within their knowledge that such marriage actually took place, and when to such testimony the additional evidence is educed showing that since the marriage the parties have deported themselves as husband and wife, a *prima facie* case has been sufficiently shown.
- [3] **ALIENATION OF AFFECTIONS — CONSPIRACY — EVIDENCE — DECLARATIONS.**—Where in an action by a wife for the alienation of the affections of her husband the defendant claimed that she was the victim of a conspiracy which had been formed for the purpose of entrapping her into a compromising position with plaintiff's husband, it was reversible error to exclude evidence of declarations made before the consummation of the conspiracy by a deputy constable, employed by plaintiff's attorney to serve process on the defendant, relative to other things he did and was to do, where the evidence established *prima facie* that he in reality was a member of the alleged conspiracy, rather than an employee thereof, although he was not named as a conspirator in the answer.

APPEAL from a judgment of the Superior Court of Los Angeles County. Willis I. Morrison, Judge. Reversed.

The facts are stated in the opinion of the court.

H. C. Millsap and Ward Chapman for Appellant.

Swaffield & Swaffield for Respondent.

SHURTLEFF, J.—This is an action by plaintiff for damages for the alleged alienation by defendant of the affec-

tions of one Orris O. Budd, the plaintiff's husband. The amended and supplemental complaint alleged that the plaintiff and said Orris O. Budd were, and ever since the fourth day of March, 1901, had been, husband and wife, and stated in detail the acts and conduct of the defendant alleged to have caused and resulted in such alienation. The defendant in her answer denied, for want of knowledge, information, or belief, that plaintiff was lawfully or otherwise married to said Budd, or that they are or at any of the times mentioned in the complaint were husband and wife, and also denied both the alienation of the husband's affections and the alleged means and acts by and through which it was claimed that the same had been accomplished. The answer further averred that the defendant was the victim of a conspiracy entered into by the plaintiff, her husband, the said Orris O. Budd, and certain other named persons, by and in pursuance of which the said Budd was to make love to defendant and was to entrap her into compromising positions with him in order to lay the foundation for and further this action, and to extort money from the defendant.

The action was tried upon the issues thus framed before the court and a jury, and resulted in a verdict for fifteen thousand dollars damages in favor of plaintiff, for which amount judgment was entered, and from which judgment this appeal is prosecuted.

The appellant does not contend that the evidence upon the issue of alienation was insufficient to support the verdict, but confines her claim for reversal to the following: First, that the marriage between plaintiff and the said Orris O. Budd was not sufficiently established; second, error in the exclusion of certain evidence; and, third, misconduct by the court in the use of certain language when ruling upon one of defendant's objections.

[1] The first of these contentions was, we think, correctly determined by the district court of appeal in the following language, which we approve and adopt: "The first . . . contention of the appellant is that the evidence which was offered by the plaintiff for the purpose of establishing the marriage between herself and Orris O. Budd was insufficient to establish such marriage, and that the objections of the defendant to the admission of the same should have been sustained. The evidence which was thus offered and objected to

was, first, that of the plaintiff herself, who, after testifying to her age and place of residence, was interrogated as follows: 'Q. Whereabouts were you married? A. Kokomo, Indiana. Q. To whom were you married? A. Orris O. Budd.' . . . The defendant hereupon interposed an objection to this evidence as incompetent, irrelevant, and immaterial, as calling for the conclusion of the witness, and not the best evidence. The objection was overruled, whereupon the witness proceeded to testify that she had the certificate of marriage with her. . . . The plaintiff was then asked by whom she was married—a minister or an official, and an objection to this question having been offered and overruled, she answered that she was married by the Rev. Mr. Floyd, a minister of the Christian church in Kokomo. She was then asked whether a license had been issued to herself and husband prior to said marriage, which question she answered in the affirmative. She then proceeded to testify that from the time of this marriage in 1901, herself and husband had lived together as husband and wife in various places, and that a strong and mutual affection had existed between them up to about the year 1913, when the affections of her husband began to cool until a few months later when they reached a point of estrangement without any fault on her part, but in spite of her efforts to retain her husband's affections. He finally left her, suggesting that she had better get a divorce. The plaintiff then proceeded to testify to the relations which she began to discover as existing between her husband and the defendant, and finally to the episode of surprising her husband at the mine, where he was employed, in a compromising position with the defendant. We are of the opinion that the evidence thus presented by the plaintiff in relation to her marriage to Orris O. Budd, and to the fact that for several years prior to the misconduct of the defendant resulting in the alienation of his affections the plaintiff and Orris O. Budd had been deporting themselves as husband and wife, was properly admitted by the trial court, and was sufficient to establish *prima facie* the fact that the plaintiff and Orris O. Budd were husband and wife. Conceding that the laws of Indiana with relation to the solemnization of marriages will be presumed to be the same as those of California upon that subject, it does not follow therefrom that in making proof of the existence of



the marriage relation it would be necessary to establish the successive statutory steps to be taken prior to and including the solemnization of such marriage specified in sections 68 to 74, inclusive, of our Civil Code. Section 57 of the Civil Code provides as follows: "Sec. 57. Consent to marriage and solemnization thereof may be proved under the same general rules of evidence as facts are proved in other cases."

[2] "We are of the opinion that the intent of this section of the Civil Code was to enable parties to or persons present at the solemnization of a marriage to testify to the fact within their knowledge that such marriage actually took place; and when to such testimony the additional evidence is added showing that since said marriage the parties thereto have departed themselves as husband and wife, a *prima facie* case has been sufficiently shown. Subdivision 30 of section 1963 of the Code of Civil Procedure, dealing with disputable presumptions, specifies as one of these the presumption 'that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.' That it was the intent of our lawmakers to render such proof sufficient to make out *prima facie* the status of husband and wife would seem to be also deducible from the fact that even in criminal cases no higher form of proof is required in this state. Section 1106 of the Penal Code provides that 'upon a trial for bigamy it is not necessary to prove either of the marriages by the register, certificate or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases.' That the rules of evidence above stated are applicable to proof of the existence of the marriage relation in other states, see *Barber v. People*, 203 Ill. 543, [68 N. E. 93]; *Franklin v. Lee*, 30 Ind. App. 31, [62 N. E. 78]; *Mathews v. Silvester*, 14 S. D. 505, [85 N. W. 998]; *Jacobsen v. Siddal*, 12 Or. 280, [53 Am. Rep. 360, 7 Pac. 108]; *Commonwealth v. Bill*, 156 Mass. 226, [30 N. E. 1016]; *Murchison v. Green*, 128 Ga. 339, [11 L. R. A. (N. S.) 702, 57 S. E. 709]; *Commonwealth v. Hayden*, 163 Mass. 453, [47 Am. St. Rep. 468, 28 L. R. A. 318, 40 N. E. 846].

"We are, therefore, of the opinion that the plaintiff, by the form of evidence which she presented to the trial court, sufficiently made out a *prima facie* case of the existence of the relation between herself and Orris O. Budd of husband

and wife, that the objections of the defendant to such evidence were properly overruled, and that her present contention that the same was insufficient to prove the fact in issue cannot be sustained."

[3] Appellant's second contention is that the trial court erred in excluding certain statements and declarations made by one R. E. Fisher, claimed by appellant to have been a member of the conspiracy which she affirmed had been formed for the purpose, through a trick, of getting her in a false and apparently improper position with Budd. An understanding of this point requires a somewhat extended reference to the proceedings which occurred in reference thereto at the trial. John F. McClure, a witness on behalf of appellant, was asked this question: "Did you at any time during that year [1913] have a conversation with R. E. Fisher and Mr. Macy in the city of Los Angeles relative to any controversy or proceedings had or taken by Mr. Fisher in any case?" An objection to the question was overruled and the witness answered: "I heard a conversation." He was then asked: "State when and where and the parties present at the time of the conversation," which question was objected to as incompetent, irrelevant, and immaterial, calling for hearsay testimony. The court thereupon asked: "This is the same conversation taken up before as to acts of various conspirators and matters relating thereto, that is the purpose of the offer?" To which appellant's attorney replied in the affirmative. A colloquy then followed between court and respective counsel, in which the court inquired if it was claimed that Fisher was a conspirator, and respondent's counsel replied that it was not so claimed in the answer, the averments of which did not in terms name Fisher as a conspirator as it did the plaintiff, Budd, and several others, but averred that respondent's attorney had employed Fisher "special deputy constable of the city of Long Beach" to serve a copy of the complaint and summons in this action upon defendant, and instructed and directed him to go to the Perris mine, where the defendant was living and Budd was working, and serve said copy of summons and complaint in the manner set forth in the answer; thereupon the court said: "The court . . . is going to hold that any act or declaration of Mr. Fisher relative to matters arising out of, and within the scope of his employment, are

admissible in evidence. . . . I am only holding that they can prove what they aver in the answer, . . . that they can prove, the employment of Fisher being admitted, that they can prove the allegations of the answer concerning that employment." Thereupon counsel for defendant made a comprehensive statement of what he offered to prove by the witness, which included that the declarations of Fisher, which he desired to put in evidence, were made on March 10, 1913 (the day following the discovery of defendant and Budd in a compromising position in defendant's room at the Perris mine); that the return of the summons had not then been made; that Fisher had not then been paid his compensation; that in pursuance of his employment Fisher had telegraphed plaintiff's attorney, who employed him, to meet him either at Long Beach or at Los Angeles on the morning of March 10th; that on that morning, and before Fisher had reached the office of plaintiff's attorney, Fisher, in the presence of one Macy and the witness, stated he had been to the Perris mine and had gone there under the instructions and directions of plaintiff's attorney "for the purpose of executing a frame-up, and that it had been agreed between Mrs. Budd, Whealton (plaintiff's attorney), Burroughs (plaintiff's brother), and other parties at the mine, that Budd should enter the room of Mrs. Morgan at a time and place to be agreed upon, and that the whole deal was carried out as planned; that it took him to frame up and pull off a deal like that; that the house of Mrs. Morgan was entered on the night of March 9th and that he held a gun on Mrs. Morgan and compelled her to submit to the taking of a flashlight picture; that a demand was made for a settlement or a payment of money, and that Mrs. Morgan did then and there agree to pay, and that he, Fisher, would get his, to wit, three thousand dollars." Plaintiff objected to the introduction of this testimony on the "ground that it was incompetent, irrelevant, and immaterial; calling for hearsay testimony, especially that portion . . . as to what the conspiracy was, and that it is prejudicial," calling for the recital of transactions by an officer, made after he had made the service for which he was employed, and that any statement or remarks made by him after he had performed his services as an officer could in no way bind any of the parties to the action. The court, in ruling upon this objec-

tion, said: "The court will hold no declarations, except those made during the pendency of the conspiracy and in furtherance of its objects, are admissible as against the co-conspirators," which would mean that the statements made by Fisher, after returning to Los Angeles, relative to the things he went to the mine to do, were not admissible, "in so far as all proof is concerned at the present time the court does not see there is sufficient before it to justify it in holding that the employment was in effect after March 9th or 10th, whatever it may be." The result was that the proffered evidence was rejected, which ruling we think was error, and that defendant should have been permitted to introduce the declarations. At the time they were made the objects of the conspiracy had not been fully accomplished, nor was Fisher's active participation in it at an end; he had not at that time made his final report to plaintiff's attorney, neither had he received the three thousand dollars which he stated was to be paid him out of the money which might be forced from the defendant by threats to send a copy of the flashlight picture showing defendant in bed with Budd, taken by those acting with and for plaintiff at the mine, on the night of March 9, 1913, to each of the heirs of defendant's deceased husband, all of which was fully known to Fisher, he being one of the party that took the photograph and having taken an active part not only in what transpired that night, but in planning and carrying out the invasion of defendant's room. It is apparent that the trial court correctly regarded Fisher as a member of the alleged conspiracy. Conceding that he may have been employed to serve the summons and complaint upon the defendant, the record shows that his connection with the matter went beyond that of a officer engaged for the sole purpose of serving legal papers. The evidence established *prima facie* that in reality he was a member of the alleged conspiracy, rather than an employee thereof. It was not necessary for Fisher, in order to make the aforementioned service, to spend two days and nights in the vicinity of defendant's mine before making such service, and to make it at night-time, under the circumstances which he did, when it clearly appears that it could have been made at a much earlier date in the daytime and in the usual way. It was not necessary that he should become a member of a party organized for the express pur-

pose of forcibly entering the defendant's room in the night-time upon receipt of a signal that Budd had entered it, such entrance not to be made without such signal. It was not necessary that, upon accomplishing such entrance by force, he should read the complaint to the defendant. It was not necessary that he should, on the night of March 8, 1913, accompany plaintiff and others of the alleged conspiracy to a barn upon defendant's said mine and near the room occupied by defendant, stay there about an hour, and finally return to the Death Valley mine, where the party, including Fisher, were staying, without making the service, because they were advised that nothing would be going on that night. It was not necessary that, when making the service of the papers in this action, he should read the names of the heirs of defendant's deceased husband to the defendant in her room on the night of March 9th. Add to the foregoing the statement of the plaintiff, that she knew Fisher carried a pistol, and of the defendant, made under oath, that on the night of March 9th, while the plaintiff and others were in her room, that someone (probably Fisher) pointed a revolver at her (defendant's) head, and the further testimony of the defendant, that she was innocent of each and every act of misconduct charged against her; that there had been no improper relations between her and Budd, we think there was, as we have said, sufficient *prima facie* proof that Fisher was a co-conspirator, to admit in evidence his alleged declarations, made during the existence, and before the consummation, of the conspiracy. As said in *Del Campo v. Camarillo*, 154 Cal. 647, 653, [98 Pac. 1049, 1052]: "The rule is that . . . declarations of one conspirator, made while the conspiracy is pending and during the progress of the plan adopted for its accomplishment, are admissible against both." While the plaintiff testified that the purpose of the incident of March 9th was to secure evidence in support of her alienation suit, the facts showed, *prima facie* at least, that its main and real object was to force defendant, through fear of disgraceful exposure, to pay plaintiff a large amount of money to keep the matter quiet and suppress the photograph so frequently referred to herein, which object (the collection of money) had not been accomplished at the time the alleged declarations of Fisher were made. Of course, the formation of the conspiracy itself could not have

been proved as against his alleged co-conspirators by the declarations of Fisher (*Barkly v. Copeland*, 86 Cal. 483, [25 Pac. 1, 405]; *Del Campo v. Camarillo, supra*), but such was not the purpose of the offer; it was to show what Fisher, as one of the conspirators, had done and said after its formation and before its consummation in furtherance thereof, and in connection therewith. Nor was it necessary for Fisher to have been one of the original conspirators in order to become a member thereof. If he knew of its existence, as he unquestionably did, he became a party thereto as completely as he would had he been one of its original organizers. (*People v. Kizer*, 22 Cal. App. 10, [133 Pac. 516, 521, 134 Pac. 346]; *United States v. Cassidy*, 67 Fed. 698.)

We discover no ground for reversal in appellant's final claim that the following remarks, made by the trial court when ruling upon one of defendant's objections, amounted to misconduct. The court said: "I think in so far as the alienation is concerned, there is no question but what the wife lost the affections of her husband at the time at least when he said he was leaving, never to return. . . . If she did not possess his affections at that time, why, certainly they could not thereafter be alienated"; thereupon the appellant's counsel asked the court to instruct the jury that the "court does not mean to say as a matter of fact it has been established, as your Honor's words would indicate, that beyond doubt the alienation has been proved," to which the court replied, "The court is not intending in any way to pass upon the facts; merely had reference to the statement made by the plaintiff that at a certain time her husband left her and stated he was never coming back." While these last quoted remarks were not cast in the form of an instruction, they were in effect the equivalent thereof, and substantially told the jury that the court was not passing upon the facts, and that that was their function.

For the reasons already stated the judgment is reversed.

Wilbur, J., Lennon, J., Sloane, J., Shaw, C. J., and Waste, J., concurred.

[Crim. No. 2370. In Bank.—January 5, 1922.]

THE PEOPLE, Respondent, v. ARTHUR OWEN DAVIS,  
Appellant.

- [1] **CRIMINAL LAW—MOTION TO SET ASIDE JUDGMENT.**—Where a judgment of conviction of a criminal offense is entered upon a plea of guilty, the defendant is not entitled to make a motion to set aside the judgment upon any grounds which would have been reviewable upon a motion for a new trial or upon an appeal from the judgment.
- [2] **ID.—ORDER DENYING MOTION—CONFLICT OF EVIDENCE—APPEAL.**—An order denying a motion to set aside a judgment of conviction entered upon a plea of guilty will not be disturbed on appeal where the evidence as to every ground relied upon in support of the motion is in direct and substantial conflict.
- [3] **ID.—YOUTH AND IGNORANCE OF DEFENDANT—IMMATERIAL MATTERS.** On an appeal from an order denying a motion to set aside a judgment of conviction entered upon a plea of guilty, the youth of the defendant and his possible misapprehension of the enormity of the crime and the severity of the penalty cannot be considered.

**APPEAL** from an order of the Superior Court of Shasta County denying a motion to set aside a judgment of conviction. Charles O. Busick, Judge. Affirmed.

The facts are stated in the opinion of the court.

Martin I. Welsh and James T. Matlock for Appellant.

U. S. Webb, Attorney-General, J. Charles Jones, Deputy Attorney-General, and Jesse W. Carter, District Attorney, for Respondent.

**THE COURT.**—This is an appeal from an order of the superior court of Shasta County denying the motion of the defendant to set aside the judgment of conviction of murder in the first degree entered against him upon his plea of guilty on January 20, 1921. No motion for a new trial was made by said defendant, nor was any appeal from said judgment taken by him, but on March 18, 1921, the defendant made the above motion that the said judgment be vacated and set aside and that defendant be permitted to withdraw



his plea of guilty theretofore entered and substitute a plea of not guilty to the information on file therein.

Said motion was based on the following ground, namely: "That the said plea of guilty was obtained from defendant and defendant was induced to enter said plea by coercion, fear, threats, misapprehension, persuasion, promises, assurances, inadvertence, ignorance of his rights and of the consequence of his act, without advice of counsel, without being advised of his legal rights, without proper arraignment, without being fully advised as to his rights on arraignment, without being informed or advised by counsel or by said court as to what the punishment for the crime of murder would be, without said court offering to appoint or assign counsel to aid and advise the defendant in his defense, without full knowledge of his rights, without defendant fully comprehending the serious consequences of his plea of guilty, and in violation of his constitutional and legal rights." The motion was supported by the defendant's own affidavit and by the affidavits of certain other persons presented at the hearing thereon, and was opposed by the presentation of the affidavits of the justice of the peace before whom the defendant's preliminary examination was held, of the district attorney, of the several officers of the law implicated in the charges made in the defendant's motion, and also by affidavits of several other persons who were cognizant of the circumstances surrounding the defendant's arrest, imprisonment, examination, arraignment, plea, judgment, and sentence. The official record of the proceedings of the court was also presented in opposition to said motion. The court denied said motion, and from its order to that effect this appeal has been taken.

[1] In the case of *People v. Mooney*, 178 Cal. 525, [174 Pac. 325] it was held that a proceeding by way of motion to set aside the judgment when made after the judgment has been rendered and become final, and after a motion for new trial has been made, or the time therefor has expired, is in the nature of an application for a writ of *coram nobis* at common law. It was further held in that case that where remedies exist by statute which did not exist at common law, the office and function of the writ are abridged thereby, and in such cases the writ is unavailable. These remedies are the right to appeal and to make a motion for a new trial,

and where they are provided by statute, to that extent an application for a writ of *coram nobis* cannot be entertained. Upon the hearing of the defendant's motion in the trial court no objection was made to the presentation of any of the various matters urged by the defendant as the bases of said motion, nor has any such objection been urged here; but notwithstanding this state of the record this court in entertaining and passing upon this appeal is not to be understood as holding that as to any of the grounds urged by the defendant in support of his said motion, which would have been reviewable upon motion for a new trial or upon appeal from the judgment, he was entitled to make said motion or to have the order denying the same reviewed upon this appeal.

[2] With respect to the other grounds upon which the defendant predicated his said motion and which were triable thereon, as, for example, the ground that the defendant's plea of guilty was extorted from him by coercion or induced by wrongful persuasions, promises, assurances, or threats, we do not consider it necessary to set forth in detail the evidence presented *pro* and *con* in regard to these matters. We have fully examined the record and have satisfied ourselves that as to all such matters, in fact, as to every ground relied upon by the defendant in support of his said motion, the evidence is in direct and substantial conflict. We may even go further and say that upon the face of the record the preponderance of such evidence is in favor of the proposition that the defendant's plea of guilty was not induced by coercion, or threats, or improperly created fears, or by improper or deceiving persuasions or assurances, and that the defendant's consent to interpose said plea and his subsequent action in declining to avail himself of the aid and advice of counsel, and in consenting to a speedy hearing upon his said plea and to the entry of an immediate judgment thereon, were not procured or induced by any improper conduct on the part of the officers of the law, nor of any failure or neglect on the part of the justice conducting the defendant's examination or the trial judge presiding at his trial in the performance of the duties required of them by law to be performed for the defendant's protection, and that the proceedings attending his arrest, detention, examination, arraignment, trial, and sentence

were in all respects regular. This being the state of the record, we are constrained to hold that the trial court acted within the bounds of a proper discretion in denying the defendant's motion, and hence its action in so doing will not be disturbed upon appeal.

[3] The appellant urges certain matters upon this appeal relating to the defendant's youth and possible misapprehension as to the enormity of his final crime and as to the severity of the penalty following the perpetration of such a crime; but these are matters which, while properly presentable to the court pronouncing judgment, and while still presentable to the pardoning power upon an appeal for the exercise of clemency, have no place or potency in this tribunal, occupied, as it must be, solely in a consideration of the legal questions presented upon such an appeal.

Order affirmed.

Richards, J., *pro tem.*, Shaw, C. J., Wilbur, J., Sloane, J., and Shurtleff, J., concurred.

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[L. A. Nos. 7112, 7113. In Bank.—January 13, 1922.]

HERBERT PEERY, Appellant, v. THE CITY OF LOS ANGELES (a Municipal Corporation), et al., Defendants and Respondents; HARRY W. ANDERSON, Intervener and Appellant.

[L. A. No. 7124. In Bank.—January 13, 1922.]

HARRY W. ANDERSON, Appellant, v. THE CITY OF LOS ANGELES (a Municipal Corporation), et al., Defendants and Respondents.

[1] MUNICIPAL CORPORATIONS — LOS ANGELES — BONDS ISSUED UNDER ACT OF 1901—SALE BELOW PAR.—Under section 2, subdivision 29, of the charter of the city of Los Angeles, providing that in the creation of a bonded indebtedness the general laws of the state shall be followed, and under section 6 of the act of 1901 (Stats. 1901, p. 29), providing that bonds voted and issued thereunder shall be sold for not less than their par value, the city is without power to sell such bonds for less than par so as to enable them

to bear six per cent instead of four and one-half per cent interest as provided in the ordinance calling the election.

[2] **ID.—PROHIBITION OF SALE BELOW PAR—ORDINANCE CALLING ELECTION—STATEMENT UNNECESSARY.**—The fact that the provision of the act of 1901 forbidding the sale of municipal bonds voted and issued under its procedure for less than their par value is not to be found in that portion of the statute prescribing what shall be contained in the proposition to be submitted to the voters for their approval does not affect the prohibition, since it is not essential, unless expressly made so, that all of the terms and conditions of the statute under which a bond election is to be held shall be set forth in the ordinances calling such election or detailed upon the ballot.

[3] **ID.—SALE OF UNSOLD BONDS BELOW PAR—ACT OF 1921—LACK OF AUTHORITY.**—An attempted sale by the city of Los Angeles of unsold bonds issued and voted under the act of 1901 for less than their par value in order to enable them to bear a greater rate of interest than provided in the ordinances calling the bond election is void, notwithstanding the act of 1921 (Stats. 1921, p. 844) providing for the sale of unsold bonds by municipalities at a price which will net the purchaser not more than the equivalent of six per cent per annum.

[4] **ID.—SALE OF BONDS UNDER ACT OF 1921—FRAUD UPON ELECTORS—CONTRACTUAL RELATIONSHIP.**—Where the city of Los Angeles voted a bonded indebtedness under the act of 1901, a status analogous to a contractual relation was created between the electors and the officials of the municipality, and the relation could not be changed by the sale of the bonds in the manner provided by the act of 1921, without working, in effect, a fraud upon the electors.

**APPEALS** from a judgment of the Superior Court of Los Angeles County. J. P. Wood, Judge. Reversed.

The facts are stated in the opinion of the court.

Emmet H. Wilson for Plaintiff and Appellant in L. A. Nos. 7112 and 7113.

Ingle Carpenter and Dana R. Weller for Intervener and Appellant in L. A. Nos. 7112 and 7113 and for Appellant in L. A. No. 7124.

Jess E. Stephens, City Attorney, W. B. Mathews, Ray C. Eberhard and Trent G. Anderson for Respondents in L. A. Nos. 7112, 7113 and 7124.

RICHARDS, J., *pro tem.*—In these two cases there are three appeals: One by Herbert Peery and one by H. W. Anderson, plaintiff and intervener, respectively, in the first of said actions, and one by H. W. Anderson as plaintiff in the second of said actions. The same questions are presented upon each of said appeals. These actions were each instituted for the purpose of obtaining an injunction against the defendant city of Los Angeles and its officials, restraining it and them from disposing of certain municipal bonds of said city for less than the par value thereof, or upon terms which would yield to the purchaser thereof a rate of interest in excess of the rate specified in the ordinances calling the respective elections held in said city for the purpose of securing the approval of its electors for the incurring of the indebtedness to be evidenced by said bond issues; and, also, for the purpose of having declared void a certain contract between said city and one I. H. Hellman, relative to the purchase of a certain portion of said bonds. As to the facts in each of these cases there is no dispute.

In the year 1914 the city of Los Angeles duly and regularly adopted certain ordinances providing for and calling a special election within said city for the purpose of submitting to the qualified voters thereof the proposition of incurring a bonded indebtedness in the sum of six million five hundred thousand dollars, for the purpose of acquiring and constructing certain works for supplying the city and its inhabitants with electricity for heat, light, and power. It was provided in said ordinances that the maximum rate of interest to be paid upon said indebtedness was four and one-half per cent per annum, payable semi-annually, which rate, it was specifically provided, should not be exceeded in the issuance of bonds for said indebtedness. The election provided for in said ordinances was duly held on the eighth day of May, 1914, and resulted in a vote of more than two-thirds of the electors voting at said election approving the incurring of said indebtedness and the issuance of said bonds. Thereafter, at intervals, several issues of portions of said bonds were duly authorized and made, aggregating in all a total of four million four hundred and forty-six thousand dollars, leaving the balance of said bonds, amounting in their face value to two million and fifty-four thousand dollars, undisposed of at the time of the institution of these

actions. The complaints in these actions allege, with relation to the said portion of said bonds remaining undisposed of, that the city of Los Angeles, through its said officials, are negotiating for the sale of said remaining portion of said bonds, and are intending and threatening to sell the same for less than the par value thereof, and upon terms which will net to the purchaser an amount of interest more than the equivalent of six per cent per annum, payable semi-annually on the par value of said bonds.

During the month of May, 1919, the city of Los Angeles duly passed and adopted another set of ordinances providing for the incurring of a further bonded indebtedness in the sum of thirteen million five hundred thousand dollars for the purpose of the construction of certain other works for the further supply of electric light, heat, and power to said city and the inhabitants, and also for the acquisition of a certain electric distributing system owned by the Southern California Edison Company, situate within said city, and for the calling and holding of a special election within said city for the purpose of securing the approval of the electors thereof for such bonded indebtedness. In the ordinances providing for the calling of said election it was expressly provided that the maximum rate of interest to be paid on said indebtedness was five per cent per annum, payable semi-annually, which rate should not be exceeded in the issuance of bonds for the said indebtedness. The election provided for in said ordinances was duly held on the third day of June, 1919, and resulted in a vote of more than two-thirds of the electors of said city voting at said election approving the incurring of said indebtedness and the issuance of said bonds. The entire amount of said bond issue yet remains unsold. The complaints in each of these actions allege that on or about the first day of August, 1921, I. H. Hellman made the city council of said city of Los Angeles a proposal in writing whereby he offered to purchase the entire issue of the aforesaid bonds for the sum of eleven million nine hundred and sixty-five thousand dollars and accrued interest to the date of delivery; that on the second day of August, 1921, the said city council of said city passed and adopted a resolution accepting said proposal, and now intends and threatens to sell and issue said bonds in accordance therewith, and for less than the

par value thereof, and upon terms which will yield to the purchaser a rate of interest in excess of five per cent per annum upon the par value of said bonds. These actions were accordingly instituted for the purpose of restraining the consummation of the sale of any part of the unsold portion of either of these bond issues for less than their par value, or upon terms which it is alleged would in effect work an increase in the rate of interest to be paid upon said bonds in excess of that provided for in the ordinances calling the special election for the purpose of securing the approval of the electors of the city for each of these bond issues. The complaints in each of these actions proceed to allege that the defendants therein in thus intending and threatening to sell and dispose of the unsold bonds in each of said bond issues are acting professedly upon and under the authority of an act of the legislature of California, approved June 1, 1921, and entitled, "An act authorizing any county, city and county, city, town, district, or political subdivision organized under the laws of this state to sell any unsold bonds thereof at a price netting the purchaser not more than six per cent per annum payable semi-annually" [Stats. 1921, p. 844]; and that said statute is in violation of the Constitution of the United States and of the state of California, in that the same is retroactive and impairs the vested rights of the plaintiffs and interveners as taxpayers of said city, and of all other voters, property owners, and taxpayers thereof, and changes and impairs the obligation of the contract entered into by the voters of said city by and through said elections, and also of the contract which the said voters at said elections authorized the defendants to enter into in reference to the terms of issuance and sale of said bonds; and in so doing deprives these plaintiffs and all other property owners and taxpayers of said city of their property without due process of law.

The answers of the defendants in each of said actions consist chiefly in the denial that any threatened or contemplated sale of the remaining unsold portion of either of said bond issues would be in violation of the constitution of the United States or of the state of California, or of law, and in that respect the defendants deny that the act of the legislature approved on June 1, 1921, relating to the disposal of the remaining unsold bonds of municipalities upon the



terms provided in said act, is unconstitutional or void as violating any vested or other rights of said plaintiffs or of the voters, property owners, or taxpayers of the city of Los Angeles, or as impairing the obligation of any contract made or authorized by the voters of said city, or as depriving the property owners or taxpayers thereof of their property without due process of law. The defendants, therefore, prayed that the plaintiffs and intervener take nothing by their said actions.

Upon the trial of these actions the court made its findings to the effect that substantially all of the allegations of the plaintiffs in each case and of the intervener were true, with the exception of those allegations attacking the constitutionality of the act of the legislature approved June 1, 1921, or assailing the legality of the proposed sale of the remaining unsold portion of said bonds thereunder, or upon the terms proposed by said I. H. Hellman for the purchase by him of the whole of the later issue of said bonds. The court accordingly decided that the plaintiffs and intervener were entitled to take nothing by their respective actions, and that the defendants were entitled to judgment in their favor and for their costs. From these judgments the plaintiffs and the intervener, respectively, have prosecuted these appeals.

In order to reach a proper understanding of the questions presented for consideration upon these appeals, it is necessary that the several constitutional and statutory provisions involved in the discussion thereof should be set forth. Section 18 of article XI of the constitution of California provides:

“No county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified voters thereof voting at any election to be held for that purpose. . . . Any indebtedness or liability incurred contrary to this provision . . . shall be void.”

The statute of 1901 which provided the procedure for the creation of bonded indebtedness by cities, under which the city of Los Angeles proceeded in respect to both of the bond elections and bond issues in question here, contains, in section 2 thereof, the following provision:

“ . . . The ordinance calling such election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvements, the amount of the principal of the indebtedness to be incurred therefor, and the rate of interest to be paid on said indebtedness, and shall fix the date on which such election will be held, the manner of holding such election and the voting for or against incurring such indebtedness, and in all particulars not recited in such ordinance, such election shall be held as provided by law for holding municipal elections in such municipality; provided, however, that if the rate to be paid on such indebtedness shall not exceed four and one-half per centum per annum, payable semi-annually, the rate of interest need not be recited in such ordinance, but in its discretion the said legislative branch may recite in such ordinance the maximum rate of interest to be paid on such indebtedness not exceeding six per centum per annum, payable semi-annually, which rate when so recited, shall not be exceeded in the issuance of bonds for such indebtedness.”

The act of 1901 also provides, in section 6 thereof, that such bonds should be issued and sold “for not less than their par value.” (Stats. 1901, p. 29.) The charter of the city of Los Angeles provides, in section 2, subdivision 29, that the city shall have the right and power:

“To incur indebtedness, by the issuance of bonds, for any of the purposes for which the city is authorized to provide, or for carrying out any of the powers possessed by the city; provided that, in the procedure for the creation of such bonded indebtedness, and for the issuance of such bonds, the general laws of the state of California, in force at the time such proceedings are taken, shall, so far as applicable, be observed and followed.”

The bonded indebtedness and bond issues of said city in question herein were proposed and voted for by the electors of said city in conformity with the foregoing provisions of its said charter and of the act of 1901. The ordinances proposing each of said bond issues and calling the elections for the purpose of authorizing the same expressly provided that the maximum rate of interest to be paid upon the indebtedness evidenced by the first bond issue was to be four and one-half per centum per annum, payable semi-annually,

and by the second bond issue was to be five per cent per annum, payable semi-annually; and also expressly provided that said bonds should be issued in accordance with the provisions of the act of the legislature of 1901.

In 1921 the legislature adopted the act relating to the sale by municipalities of unsold bonds to which reference has heretofore been made. Section 1 of said act reads as follows:

“Section 1. Any county, city and county, city, town, district or other political subdivision organized under the laws of this state may sell any bonds thereof remaining unsold, and which have heretofore been authorized by the qualified electors thereof at an election called and held as provided by law, at a price which will net the purchaser not more than the equivalent of six (6) per cent per annum, payable semi-annually, on the par value of such bonds; provided, that this act shall not apply to any such bonds which have been authorized under a law permitting the sale thereof at a price netting the purchaser more than such equivalent.” (Stats. 1921, p. 844.)

[1] The main contention of the appellants is that both the statutes of the state and the charter and ordinances of the city of Los Angeles, having relation to the two bond issues involved in the instant cases, do expressly prohibit the sale of said bonds for less than their par value; and the appellants further contend that this express prohibition reaches back to the very inception of the proposition for the creation of a bonded indebtedness in each case, and enters vitally into the vote of the electors of said city, granting permission to its officials to create a bonded indebtedness and issue these bonds upon the express condition and understanding that they were not to be sold for less than their par value. The statute of 1901, under the terms of which the proceedings leading up to the creation of the municipal indebtedness evidenced by each of these bond issues were taken, does contain the express provision that municipal bonds issued in accordance with its procedure should not be sold “for less than their par value.” The charter of the city of Los Angeles adopts the provisions of the general laws in force at the time as the procedure to be followed in providing for such indebtedness and for the issuance of such bonds. (Stats. 1911, p. 2063.) The ordinances of said

city proposing these respective bond issues and providing the procedure for holding the required elections conformed to the provisions of the said act of 1901, and while they do not expressly embrace the provision in said act that such bonds, when issued, should not be sold for less than par, they do so in effect by conforming to the general terms of said act and advising the electors that their permission to create such indebtedness and to issue such bonds is sought under its terms and conditions, among which is the express provision that the bonds so issued with their approval should not be sold for less than their par value. We are constrained, therefore, to hold that this express prohibition of the act of 1901 against the sale of the bonds in question at less than their par value forbids the violation on the part of the said city and of its officials of a vital and essential condition upon which the permission of the electors of said city for the creation of said indebtedness and issue of said bonds was obtained. In arriving at this conclusion we are mindful of the argument put forth by the respondents herein to the effect that the provisions in the act of 1901 forbidding the sale of municipal bonds voted and issued under its procedure for less than their par value is not to be found in that portion of said statute prescribing what shall be contained in the proposition to be submitted to the electors for their approval; such as the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvements, the rate of interest to be paid, and the like; and hence is not an essential or mandatory portion of said statute, nor one upon which the voters were required to exercise their election. This argument is neither persuasive nor sound. The electors of the city were advised by its charter and by its ordinances calling these bond elections that the law under which the city and its electors were acting in the matter of the proposed creation of a bonded indebtedness and the issue and disposition of these bonds was the act of 1901, all of the provisions of which were presumably known to every elector whose approval was sought thereon. [2] We do not understand that it is essential, unless expressly made so, that all of the terms and conditions of the statute under which a bond election is to be held shall be set forth in the ordinances calling such election, or detailed upon the ballot

submitting the main question to the voters for their approval; nor do we understand the case of *People etc. v. City of Los Angeles*, ante, p. 56, [200 Pac. 947], to so decide. It follows from the foregoing that any attempt on the part of said city or its officials to dispose of these bonds for less than their par value, while the state of the law under which the said indebtedness was proposed to and approved by the electors of said city remained unchanged, would have been abortive and could have been restrained at the suit of any property owner and taxpayer injuriously affected by such an act. [3] The respondents, however, contend that the law in relation to the price at which these respective bond issues were to be sold has not remained unchanged, and they direct our attention to the fact that the legislature of this state has enacted the statute approved June 1, 1921, the title and provisions of which are above quoted, enabling municipalities to sell any of the bonds thereof remaining unsold at the date of the approval of said act at a price which shall net the purchaser not more than the equivalent of six per cent per annum on the par value of said bonds. It is not disputed that the above provision in said act amounts to the granting of permission to municipalities to dispose of their remaining unsold bonds at a price below their par value; but the contention of the respondents is that the legislature, having originally had power to impose upon municipalities the aforesaid restriction against the sale of their bonds below par, had power through the passage of said act to remove said inhibition and relieve municipalities from the burden thereof. The respondents present this contention in several different forms. They argue, first, that by the terms of the charter of the city of Los Angeles, above quoted, it is provided that "in the procedure for the creation of such bonded indebtedness and for the issuance of such bonds, the general laws of the state of California in force at the time such proceedings are taken shall, so far as applicable, be observed and followed." The construction which the respondents would have us place upon this provision of the charter is that whatever changes the legislature might make in the general laws with relation to the bond issues of municipalities up to the time of the actual issuance and sale of such bonds would be controlling as to the issuance and sale of such bonds after the passage of the later

enactment. The respondents cite in support of this phase of their contention the case of *Fritz v. San Francisco*, 132 Cal. 373, [64 Pac. 556]. This case does not sustain the respondents' contention in that regard, but rather leans in the other direction, since it is therein decided that when the general law under which proceedings for the issuance of certain bonds had been initiated in the city of San Francisco was entirely superseded by the adoption of the charter of said city, which provided its own complete scheme for the issuance of municipal bonds, the bonds formerly voted for under the general law could not be issued under the provisions of the charter. We are also referred to the cases of *Brownell v. Town of Greenwich*, 114 N. Y. 518, [4 L. R. A. 685, 22 N. E. 24], and *Morgan v. Falls City*, 103 Neb. 795, [174 N. W. 421], as sustaining the respondents' contention. But the first of these cases it was merely held that a subsequent legislature might correct irregularities in the action of officials conducting a bond election which did not affect the consent of the taxpayers previously given; while in the latter case it was expressly held that an attempted statutory change in the terms of the bonds voted for under a prior law, providing that they should become due in forty years but be payable at any time after ten years, which change would make such bonds fall due in twenty years and payable at any time after five years, could not be permitted, the court holding that this was a substantial change affecting the rights of the taxpayers. The court also held that "The proposition to make the bonds payable at any time after five years was never submitted to the voters; hence was never adopted by them; bonds issued must conform to the proposition adopted by the electors." But aside from the inaptitude of these citations we do not accept the construction of the Los Angeles charter provision for which the respondents contend, since to do so to the extent claimed would be to sanction an entire subversion of the will of the electors as to practically all of the conditions upon which their consent to the incurring of the indebtedness and the issuance and disposition of the bonds had been obtained through the simple expediency of a legislative enactment. For reasons hereafter to be given, such an interpretation of the charter provision should not be adopted.

The respondent further urges in support of its main contention in this regard that since the legislature in adopting the statute of 1901 might have omitted the requirement as to the sale of bonds to be voted and issued thereunder for not less than their par value, a subsequent legislature would have power to relax or remove this restriction at any time; and we are cited to the case of *Cole v. City of Los Angeles*, 180 Cal. 617, [182 Pac. 436] as sustaining this view. In the above-cited case the question was whether or not the statement in the ordinance calling the election that "the maximum rate of interest to be paid on said indebtedness shall be six per cent per annum payable semi-annually" complied with the statute which required the ordinance calling the election to state "the rate of interest to be paid on the indebtedness." It was held that such variance could be cured by statute. There the electorate were fully advised as to the maximum indebtedness to be incurred and voted for such maximum and no constitutional question was involved.

The respondents finally urge that a subsequent legislature would have power to change this requirement in the earlier statute under which these bonds were voted, for the reason that the electors, in voting to approve the creation of the indebtedness and issue and sale of the bonds in the form and upon the terms specified in such statute, did so with the knowledge that the terms of such statute were subject to legislative change and, therefore, gave their approval of these bond issues with the understanding that such changes might be made. This argument is nothing more nor less than a seductive sophistry, since to give it the application for which the respondents contend would be to render every substantial statutory or contractual right of individuals subject to be taken away for no better reason than that they had acted or contracted in view of possible changes in the law. There is one comprehensive answer to each and all of the foregoing arguments of the respondents in support of the general proposition that the act of the legislature of 1921 has been effectual to remove the requirement of the act of 1901, that these bonds should be voted for and issued upon condition that they should not be sold for less than their par value. It is this: The constitution, by virtue of the section above quoted, gives to the electors of a municipality the substantial right to grant or refuse their approval to the in-



currence of any indebtedness beyond the limit expressed in said constitutional provision. The act of the legislature of 1901, in giving effect to this provision of the constitution by providing the procedure in conformity with which the electors' approval or disapproval of a proposed bonded indebtedness was to be expressed, has provided the particular terms and conditions upon which the approval of the electors might be secured. Among these were the requirements that the ordinances calling the election should recite the objects and purposes for which the indebtedness was proposed to be incurred, the estimated cost of the public improvement to which the funds secured were to be applied, the amount of the principal of the indebtedness, the rate of interest to be paid thereon. These recitals must be set forth in the ordinances providing for and calling the election, but, in addition to these, there is the added provision that the bonds when issued should be sold "for not less than their par value." This provision in the act has a twofold purpose: First, to assure the electors that the entire sum for which they vote to burden themselves and their city with a bond issue will be realized from the sale of the bonds; second, to assure the electors that the objects and purposes for which the bonded indebtedness is to be incurred shall be fully subserved through the application of the whole face value of the bonds to such objects and purposes. This thought is well expressed in the case of *Uhler v. City of Olympia*, 87 Wash. 1, [151 Pac. 117], where the court, in dealing with an attempted payment of commissions and compensation for selling certain municipal bonds, aptly said: "The limitation in the power of the council is just as prohibitive, and, if disobeyed, would result in the same evil, as if the statute had provided that the bonds should be sold at not less than par. In either case the object of the law is to prevent speculation in municipal securities, and to insure to those who must ultimately pay the bonds a dollar in lawful currency for every dollar of obligations issued."

In these aspects this stipulation in the statute providing for the bond election is as vital as any other provisions in it, since it goes directly to the matter of the relative amount of the burden and benefit which the electors are to agree by their votes to assume. The proposition having thus been made by the officials of a city to the voters thereof to ap-

prove a bonded indebtedness for the specified purposes in the specific amount of principal, at the specified rates of interest and upon the express assurance that the bond issues, if approved, should not be sold for less than their par value, what relation is created as between the city, through its officials on the one hand and the electors on the other, by the latter's formal acceptance of such proposition through the required vote? In some jurisdictions it has been held that the relation thus created is a contractual one, which cannot be changed in any essential particular by the officials of the city, either with or without the aid of later legislation. In the case of *Merchants etc. Bank v. Escondido Irr. Dist.*, 144 Cal. 329, [77 Pac. 937], which involved the question as to whether the board of directors of an irrigation district, after the property owners forming the district had voted to issue bonds for the purpose of carrying out the object of its formation, under an act declaring how said bonds should be paid, could be permitted by a later and amendatory act, to provide a different method of payment of the indebtedness secured by said bonds, this court said:

“The act providing for the organization of the district, and the organization of the district under the provisions of the act by the vote of its electors, cannot be otherwise regarded than as a contract between the state and the individuals whose property was thereby affected. The contract, indeed, lacks one of the ordinary elements of contracts—namely, the actual consent of all the parties to it; but by the provisions of the statute the majority of the electors were empowered to act and consent for the individual proprietor; and unless this were a legitimate exercise of the powers of the state, the statute itself would be invalid. Hence the consent of all the parties to the contract was in fact given either personally or by their authorized agents; and there was thus created a complete contract between the parties by the terms of which the property owners in the district consented to the burden imposed upon their property by the provisions of section 17 of the original act and to no other. The burden thus imposed was, that the bonds issued under the act should ‘be paid by revenue derived from an annual assessment upon the real property of the district,’ and that their

lands should 'be and remain liable' for such assessment; and this implied that this should be the extent of the burden. But by the amendatory act the board of directors is authorized, without the consent, or even the knowledge, of the land owners, to pledge or hypothecate the property acquired by their contributions—that is to say, acquired with their money—and thus to subject them to the liability of losing entirely the property thus acquired; which is not only their property, but by the express provision of the statute (sec. 13) has been 'dedicated and set apart to the uses and purposes set forth in the original act'; which would leave them only the liability for continued assessments until the balance of the bonds shall be paid. We have no doubt, therefore, that in this respect also the legislature went beyond its constitutional powers."

The authorities in other jurisdictions holding the same view are *Deland v. Platt Co.*, 54 Fed. 823; *David v. Timon* (Tex. Civ. App.), 183 S. W. 88; *Scott v. Forest*, 174 Ky. 672, [192 S. W. 691]; *Percival v. City of Covington*, 191 Ky. 337, [230 S. W. 300]; *Wullenwaber v. Dunnigan*, 30 Neb. 877, [13 L. R. A. 811, 47 N. W. 420]; *Lawson v. Kenawho Co. Court*, 80 W. Va. 612, [92 S. E. 786]. [4] We do not, however, deem it necessary to go so far in this case as to hold that a contractual relation, in the ordinary sense of the term, has been created between the electors of the city of Los Angeles and the officials thereof by the proposal and approval of these bond issues, but we are satisfied that a status analogous to such relation was created through the exercise of the constitutional right of the electors of said city in approving the creation of the bonded indebtedness represented in these two bond issues upon the express conditions and assurances contained in the act of 1901, which may not be changed in the manner and to the extent it is sought to be changed under the provisions of the act of 1921, without working, in effect, a fraud upon the electors through securing their votes for the approval of these bond issues upon terms and conditions which will not be kept if the attempted sale of these bonds below their par value is given the sanction of this court. In the case of *Wallace v. Bell*, 205 Ala. 623, [88 South. 442], the court, in

dealing with a similar constitutional provision to ours, and with similar situation to that presented in these cases, through the attempted legislation identical in effect to that of the statute of 1921, says:

“A majority of the voters answered by ballot ‘yes.’ Now, the legislature attempts by this act, without any clear intimation thereof in its title, to authorize these bonds sold at a discount—below par—which will net to the purchaser seven per cent per annum on his investment. The interest on the bond is a part of the bond. If the legislature can increase the rate of interest, or sell the bonds below par after the voters authorized a sale at par and at five per cent interest, then they can take away entirely from the majority of the voters the right to have the bonds issued. The constitution gives the legislature the right to fix the mode and manner of getting the will of the qualified voters on a bond issue; and it gives to the majority of the qualified voters at the election the right to authorize the issuance of the bonds by the board of revenue. The voters having fixed by ballot the amount of the bond issue, the maximum rate of interest, and under a law stating that they must not be sold below their face value, it is then beyond the power of the legislature to authorize a higher rate of interest thereon or a sale of these bonds below par.”

In the case of *Skinner v. City of Santa Rosa*, 107 Cal. 464, [29 L. R. A. 512, 40 Pac. 742], which was a case wherein the officials of the city of Santa Rosa had undertaken to change the amount of interest to be paid upon certain municipal bonds of said city, after a vote of its electors approving the issue of such bonds, this court held that the provision for the payment of the added interest upon said bonds would in effect increase the amount of the indebtedness which the electors had by their votes approved, and would to that extent be a violation of the constitutional inhibition. And the court goes on to say:

“If the terms and conditions submitted to the electors may be departed from, and such election held to authorize the issuance of bonds under other terms and conditions, a door will be opened authorizing the common council to submit a proposition so favorable as to secure beyond question a favorable vote, and then change the conditions

as to rate of interest and otherwise, even without any fraudulent purpose or intent, so that, if again submitted, an overwhelming defeat would result. . . . In the case at bar, where the question arises before the bonds have been delivered, we hold that the city has no power to issue them in a form which does not substantially comply with the terms stated in the ordinance of submission and notice of election, and with the statute under which the proceedings were had."

It is not intended by anything said in this opinion to suggest or intimate that there was any actual fraudulent intent on the part of the officials of the city of Los Angeles in seeking to take advantage of the terms of the statute of 1921 by disposing of these bond issues at less than their par value. Nevertheless, so to do either with or without the sanction of said act would be to accomplish a purpose directly violative of one of the essential conditions upon which the constitutional approval by the electors of said city of these bond issues was obtained, and in that sense a fraud would be wrought by permitting that condition to be violated by the sale of these bonds below par. For this reason we are constrained to hold that the authorization attempted to be conferred upon said city of Los Angeles to dispose of the unsold portion of these bond issues for less than their par value by the act of 1921 is invalid, and hence that the plaintiffs and intervenor in these actions were entitled to an injunction restraining such attempted or threatened sales.

The judgment is reversed.

Waste, J., Wilbur, J., Sloane, J., Shurtleff, J., and Lennon, J., concurred.

SHAW, C. J., Concurring.—I concur in the foregoing opinion.

I wish to add, however, that, in my opinion, the vote of the people, by which the city was authorized to sell the bonds at a price not less than par, constituted a part, and a material part, of the contract evidenced by the bonds, as stated in *Merchants Nat. Bank v. Escondido Irr. Dist.*, 144 Cal. 329, [77 Pac. 937]. The city is the nominal obligor or promisor on the bonds. It has no authority to

make the promise and issue the bonds, except such as it obtained by this vote, and that authority was conditioned that the buyer of the bonds, the promisee, should pay to the city at least the par value as the consideration thereof. The real payors of the bonds are the people who pay the taxes levied to raise the fund for that purpose. They are, under the constitutional scheme, in substance and effect the principals whose authority must be first given, in order to authorize their agent, the city, to make the contract. This authority, as evidenced by the records of the election at which the authority was given, must be considered as a part of the contract, at least to the extent that the conditions therein stated cannot be disregarded by the city in selling the bonds, nor by the purchaser at the sale, and this being so, it necessarily follows that an act of the legislature purporting to authorize a disregard thereof would, if valid, impair a material portion of the contractual obligation.

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[Crim. No. 2434. In Bank.—January 19, 1922.]

In the Matter of the Application of TOM SCOTT for a Writ  
of Habeas Corpus.

- [1] **INSANE PERSONS—TRIAL BY JURY—TIME—CONSTRUCTION OF CODE.** The provision of section 2174 of the Political Code that after the demand for a jury upon an inquisition of insanity, the court must cause a jury to be summoned and to be in attendance at a date stated, not less than five nor more than ten days from the date of the demand for a jury trial, is directory only, and the failure to impanel a jury and try the matter of insanity within ten days from the date of the demand does not deprive the superior court of jurisdiction to proceed thereafter with the matter.
- [2] **ID.—AGREEMENT ON VERDICT—CONSTRUCTION OF CODE.**—The provision of section 2174 of the Political Code that the alleged insane person must be discharged unless a verdict that he is insane is found by at least three-fourths of the jury does not mean that he must be discharged if the jury fails to agree, but means that upon such trial a verdict could be returned by three-fourths in number of a jury of twelve in the same manner as in civil cases, and that he cannot be committed as insane unless a verdict of insanity is found and concurred in by at least three-fourths of the jury.

APPLICATION for a writ of Habeas Corpus to secure release pending a trial for insanity. Denied.

The facts are stated in the opinion of the court.

John R. Connelly for Petitioner.

SHAW, C. J.—The petitioner was detained upon a charge of insanity upon an affidavit as provided in section 2168 of the Political Code. He was arrested on a warrant issued thereon on September 1, 1921. An inquisition of insanity was held and on September 7, 1921, he was ordered committed to the state hospital at Napa. Within five days thereafter he demanded in writing that the matter of his sanity be tried by a jury. The jury was not called until November 15, 1921. Upon the trial which then took place the jury failed to agree. On November 28, 1921, the matter was reset to be tried on December 1, 1921. So far as appears from the petition, the trial did not take place at that time and the cause is still pending in the superior court for final determination. This is not alleged but we will assume it to be the fact.

Upon these facts the petitioner claims the right to his release on the ground: 1. That the court lost jurisdiction to act in the matter by its failure to have the cause tried by a jury within the ten days after the date of the demand therefor. 2. That the detention is illegal because, as is claimed, the statute requires his discharge upon the failure of the jury to agree. These points, it is contended, are settled by section 2174 of the Political Code.

Section 2174 provides that after the demand for a jury trial upon an inquisition of insanity, the court "must cause a jury to be summoned and to be in attendance at a date stated, not less than five nor more than ten days from the date of the demand for a jury trial. At such trial the cause against the alleged insane must be represented by the district attorney of the county, and the trial must be had as provided by law for the trial of civil causes before a jury, and the alleged insane person must be discharged unless a verdict that he is insane be found by at least three-fourths of the jury. If the verdict of the jury is that he is insane,



the judge must adjudge that fact and make an order of commitment as upon the original hearing.”

[1] We are of the opinion that the failure of the court to impanel a jury and try the matter of insanity within the ten days from the date of the demand does not deprive the superior court of jurisdiction to proceed thereafter with the matter. We deem the provision to be directory only. If the superior court should unreasonably delay the trial, the remedy would be by a proceeding in *mandamus* in the district court of appeal or the supreme court to compel the court to proceed.

[2] We do not understand the provision that the alleged insane person must be discharged unless a verdict that he is insane is found by at least three-fourths of the jury to mean that he must be discharged if the jury fails to agree. Our interpretation of the clause is that it was intended to provide that upon such trial a verdict could be returned by three-fourths in number of a jury of twelve in the same manner as in civil cases and that he cannot be committed as insane unless a verdict of insanity is found and concurred in by at least three-fourths of the jury. The failure of the jury to agree did not oust the jurisdiction of the court to proceed in the matter. The charge still remains against the petitioner and it is the duty of the superior court to proceed as speedily as is reasonably possible to a final determination upon the matter of his insanity by a verdict concurred in by at least three-fourths of the jury. Upon the facts stated in the petition we think the superior court has power to proceed in the matter and to detain the petitioner until it is finally disposed of.

The petition for a writ of *habeas corpus* is denied.

Lawlor, J., Sloane, J., Wilbur, J., Lennon, J., Shurtleff, J., and Waste, J., concurred.

[Crim. No. 2435. In Bank.—January 24, 1922.]

In the Matter of the Application of ROBERT STEVENSON for a Writ of Habeas Corpus.

- [1] CRIMINAL LAW—INSANITY BEFORE TRIAL—CONVICTION AND IMPRISONMENT—HABEAS CORPUS.—A prisoner in a state prison is not entitled to his discharge on *habeas corpus* on the ground that prior to the time he was charged with the crime for which he was sentenced he had been committed to a state hospital as an insane person, and that he had never been lawfully discharged therefrom or formally restored to sanity.
- [2] ID.—INSANITY—JURISDICTION—COLLATERAL ATTACK.—When a person is charged with crime by information or indictment, if the defense of insanity exists, it must be presented to the court having jurisdiction of the cause, and the decision of that court is final against collateral attack.
- [3] ID.—FINAL JUDGMENT—INSANITY—HABEAS CORPUS.—After a conviction and sentence have become final, the question of insanity of the defendant at the time of trial cannot be raised on *habeas corpus*.

APPLICATION for a Writ of Habeas Corpus to secure release from imprisonment in state prison. Denied.

The facts are stated in the opinion of the court.

Robert Stevenson, *in pro. per.*, for Petitioner.

SHAW, C. J.—The petitioner, Robert Stevenson, is imprisoned in the state prison at Represa, California, upon a charge of forgery under sentence for the period prescribed by law. He applies for a writ of *habeas corpus* on the ground that prior to the time he was charged with the crime and sentenced to imprisonment he had been committed to the Norwalk state hospital as an insane person and that he had never been lawfully discharged from said hospital nor formally declared restored to sanity, and that until he was so restored or discharged from that custody he could not be prosecuted for felony.

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1. *Habeas corpus* to secure release of one convicted while insane, note, L. R. A. 1918B, 81.

[1] The petitioner is mistaken with regard to the effect of the commitment to a state hospital as an insane person.

[2] When a person is charged with crime by information or indictment, if the defense of insanity exists, it must be presented to the court having jurisdiction of the cause, and the decision of that court is final against any collateral attack. If an appeal is taken the appellate court may consider the question. Its decision thereon, when it becomes final, if it affirms the judgment, puts the case beyond further consideration by any court. So far as the legality of the sentence for the crime charged is concerned, *habeas corpus* does not lie unless the lack of jurisdiction appears on the face of the record of conviction. If it does not so appear the jurisdiction will be presumed. These propositions also apply to the question whether the court had authority to proceed with the trial of the criminal charge upon the claim that he was at that time of unsound mind. [3] After the conviction and sentence have become final, the question of his insanity at the time of trial cannot be raised on *habeas corpus*.

The petition for a writ of *habeas corpus* is denied.

Lennon, J., Waste, J., Lawlor, J., Sloane, J., Wilbur J., and Shurtleff, J., concurred.

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[S. F. No. 9556. In Bank.—January 27, 1922.]

YOSEMITE LUMBER COMPANY (a Corporation), et al.,  
Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

[1] WORKMEN'S COMPENSATION LAW—FATAL INJURY TO EMPLOYER WITHOUT DEPENDENTS—PAYMENT OF EMPLOYER TO STATE—CREATION OF FUND FOR DISABLED WORKMEN—POWER OF LEGISLATURE—CONSTITUTIONAL LAW.—The legislature has not the power under section 21 of article XX of the constitution, as amended in 1919, vesting it with power to create and enforce a complete system of

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1. Constitutionality of Workmen's Compensation Act, notes, *Ann. Cas.* 1912B, 174; *Ann. Cas.* 1915A, 247; *Ann. Cas.* 1916B, 1286; *Ann. Cas.* 1917E, 401, 839; *Ann. Cas.* 1918B, 611; 34 *L. R. A. (N. S.)* 162; 37 *L. R. A. (N. S.)* 466; *L. R. A.* 1916A, 409; *L. R. A.* 1917D, 51.

workmen's compensation, to require an employer to pay to the state a certain sum whenever one of his workmen who has no dependents is killed by an injury received in the course of his employment, and to confer jurisdiction on the Industrial Accident Commission to adjudicate the liability of the employer therefor to the state, and the act of the legislature (Stats. 1919, p. 273) so providing, enacted for the purpose of creating a fund for the promotion of vocational re-education and rehabilitation of persons disabled in industry in this state and to provide funds for the insurance bureau of the commission, is unconstitutional.

- [2] CONSTITUTIONAL LAW—FUND FOR DISABLED WORKMEN—JURISDICTION OF INDUSTRIAL ACCIDENT COMMISSION—POWER OF LEGISLATURE.—While, under its general powers, the legislature might provide a fund for the benefit of persons disabled in industry in this state and commit the administration of the fund to the Industrial Accident Commission, and might also levy a tax in some form to raise such fund, any disputes that might arise concerning such tax would be cognizable only by the courts established by or under the provisions of article VI of the constitution, since no section of the constitution gives the legislature power to confer jurisdiction thereof upon such commission.

PROCEEDING in *Certiorari* to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

A. E. Bolton and Arthur W. Bolton for Petitioners.

Adolphus E. Graupner, U. S. Webb, Attorney-General, and Warren H. Pillsbury for Respondents.

SHAW, C. J.—This is a proceeding in *certiorari*, under the Workmen's Compensation, Insurance and Safety Act [Stats. 1917, p. 831], to review an order of the Industrial Accident Commission requiring the Yosemite Lumber Company to pay to the state of California the sum of \$350 for the death of John Moore, who was killed by an injury arising out of, and in the course of, said employment. Moore left no dependents surviving him.

The order was made under the authority of the act of 1919 (Stats. 1919, p. 273). The sole question for decision, as we view the case, is whether or not the said act gives the

commission jurisdiction to adjudicate the liability of the employer to the state.

The act provides that when an employee receives a fatal injury, of a kind that is compensable under the provisions of the Workmen's Compensation, Insurance and Safety Act, and "does not leave surviving him any person entitled to a death benefit, the employer . . . shall pay into the treasury of the State of California the sum of three hundred and fifty dollars for each such fatal injury in addition to any other payments under the provisions of said Compensation Act," not exceeding three times the average annual earnings of such employee, and that the moneys so paid "shall be covered into a special fund to be known as the 'industrial rehabilitation fund,' which fund is hereby created and appropriated for the purposes set forth in this act" (sec. 1).

It further declares that said fund may be used by the Industrial Accident Commission "for the promotion of vocational re-education and rehabilitation of persons disabled in industry in this state" (sec. 2); that the remainder of the fund which may be left after the commission shall have used so much thereof as they deem best in such promotion shall be placed "semi-annually, to the credit of the accident prevention fund, established by said compensation act" (sec. 3; also sec. 51, Compensation Act, Stats. 1917, p. 865). When five thousand dollars "shall have been accumulated in said fund" it is to be deposited "with the State Compensation Insurance fund as a revolving fund." From this "revolving fund" the payments so required by the afore-said sections 1, 2, and 3 are to be made, on the order of the Industrial Accident Commission, and the "state treasurer shall from time to time, upon the order of the commission, reimburse said state compensation insurance fund from the industrial rehabilitation fund for expenditures made from said revolving fund." The expenses of administration of the state compensation insurance fund in carrying out the duties imposed by the act are also "to be paid from said state industrial rehabilitation fund," all under the direction of the commission (sec. 4). The commission is given jurisdiction to determine the liability of such employer and to require the payment by him of the \$350 to the state in such cases by proceedings before it in the same manner as provided in the Workmen's Compensation, Insurance and

Safety Act; "provided further" that at any time after it is paid into the state treasury any person claiming to be a dependent of the employee may establish such dependency to the satisfaction of the commission and thereupon the state may be required to pay to said dependent the said \$350, or whatever thereof is necessary to meet his claim (secs. 5 and 6).

The accident prevention fund referred to is used to support the "department of safety" carried on by the Industrial Accident Commission (secs. 33-52, Workmen's Compensation Act). The state compensation insurance fund mentioned is established by the Workmen's Compensation Act for the purpose of enabling the commission to carry on the business of an insurance carrier for employers, with respect to their liability under the act.

It will be seen from these provisions that the act makes no provision for compensation by the employer to the person injured, nor to the dependents of such person. The "compensation" contemplated by the act is only to be made when the workman who is killed by the injury leaves no dependents to be compensated, and it goes to other persons not related to the deceased workman nor connected with his employer. It goes to the state to enable it to carry on a benevolent enterprise for the benefit of a class of workmen throughout the state—and to provide funds for the insurance bureau of the Industrial Accident Commission. The true intent of the act is to provide for the creation of a general fund for these purposes.

The proceeding in which the order or award in question was made was begun by the state of California after the death of John Moore. In its petition it averred that Moore left surviving him no person dependent on him for support, nor any person entitled to a death benefit under the compensation act, and that, on account thereof, \$350 was owing by the Yosemite Lumber Company to the state, under and by virtue of said act of 1919.

The act of 1919 purports to confer upon the commission the power to make orders determining and enforcing the liability which the act creates. It is contended on behalf of the commission that legislative authority to confer such power upon the commission is found in section 21, article XX, of the constitution, as amended in 1918. This claim

is contested by the petitioner, who asserts that it has no such effect.

Prior to the amendment of 1918 section 21 of article XX read as follows: "The legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment, irrespective of the fault of either party. The legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, or by an industrial accident board, by the courts, or by either, any or all of these agencies, anything in this Constitution to the contrary notwithstanding."

The following is the section as amended in 1918, [Stats. 1919, p. lxxv]: "The legislature is hereby expressly vested with plenary power, unlimited by any provision of this constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a state compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legis-



lation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government.

“The legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of the state. The legislature may combine in one statute all the provisions for a complete system of workmen’s compensation, as herein defined.

“Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the Industrial Accident Commission of this state or the state compensation insurance fund, the creation and existence of which, with all the functions vested in them are hereby ratified and confirmed.”

The power to determine whether or not the liability referred to in the first paragraph of the above section and imposed by this law exists against any person is judicial power. (*Western etc. Co. v. Pillsbury*, 172 Cal. 411, [Ann. Cas. 1917E, 390, 156 Pac. 491]; *Pacific C. C. Co. v. Pillsbury*, 171 Cal. 322, [153 Pac. 24]; *Carstens v. Pillsbury*, 172 Cal. 579, [158 Pac. 218]; *Marin W. & P. Co. v. Railroad Com.*, 171 Cal. 712, [Ann. Cas. 1917C, 114, 154 Pac. 864].) It is claimed that the new section authorizes the creation of a liability on employers in favor of the state for the benefit of workmen in general, and that it gives the legislature power to confer on the Industrial Accident Commission jurisdiction to determine disputes concerning such liability. The second paragraph of the section is the part which purports to give this power, if it is contained anywhere in the section. It gives no authority to create a tribunal for any other purpose or with any other judicial power than to settle the

“disputes arising under such legislation,” referring to the legislation provided for in the first paragraph of the section. It is, therefore, apparent that when we have ascertained the kind and character of the disputes that may arise under the legislation authorized by the first part of the section, we have found the limits beyond which the judicial power and jurisdiction of the Industrial Accident Commission cannot go.

The first grant to the legislature by the new section is the grant of power “to create and enforce a complete system of workmen’s compensation.” This does not authorize the creation of a liability on any person to pay such “compensation,” or require any person to contribute funds to support the proposed system. It does not purport to touch upon the subject of liabilities.

The next phrase of the new section empowers the legislature “in that behalf to create and enforce a liability on the part of any and all persons to compensate any and all of *their workmen* for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment.” This does not authorize the creation of a liability on the part of any person to compensate the workmen of other persons, nor the dependents of workmen of other persons. The phrase “their workmen” necessarily confines the persons to be compensated to workmen who are in the employ of the person who is made liable. This is also shown by the provision that if the workman is killed by an injury in the course of his employment, the compensation is to be made to his “dependents,” thus excluding any idea of liability in such a case to provide for the welfare of workmen in general, or of a particular class of disabled workmen, in no way connected with the employer who is made liable for the particular injury. Nothing is added to the force of the provision by the use of the word “plenary.” If the legislature has power to do a certain thing, its power to do it is always plenary. It is merely surplus verbiage.

The use in this clause of the words “any and all persons,” in describing those made liable, and the words “any and all of their workmen,” in describing those to be compensated, do not show an intent to empower the legislature to enlarge the liability against a particular employer for a

particular injury so as to include compensation to workmen in general as a class, or a contribution to a fund to be applied to the benefit of a class of persons, instead of to the dependents of the workman who may be killed by the injury.

Nor is such enlarged meaning given to the section by the use of the phrase "complete system of workmen's compensation," in the opening clause, or by the elaborate definition of that phrase which follows the first sentence. The section mentions and describes but one kind of liability: the liability of "any or all persons" to compensate "any or all of *their* workmen." This is in effect a provision to compel any person to compensate *his* workmen, which is but another form of saying that any employer shall compensate *his* employee, for an injury arising out of the employment, or the dependents of such employee, if the injury causes death to him. The language of neither one of these parts of the section shows or expresses an intent to add another liability to that expressly stated. In these circumstances the maxim "*expressio unius, est exclusio alterius*" is applicable, and the meaning to be inferred is that only which is explicitly stated. And particularly it should not be inferred or implied from such language that so novel and different a thing was intended as the liability to the state which is imposed by the act of 1919.

That there was no such thought in the minds of those who framed the amendment, or of the legislature that proposed it, is clearly indicated by the argument in favor of the amendment in the pamphlet distributed to the voters with the ballot at the election at which the amendment was adopted. The amendment was proposed by the legislature of 1917. Under section 1195 of the Political Code, when the legislature proposes an amendment to the constitution to be voted upon by the electors of the state, the author of such amendment and one member of the same house who voted with the majority in submitting the same shall be appointed as a committee to draft an argument giving the reasons for the adoption of such amendment. This argument is to be printed in a pamphlet and distributed to the voters with the sample ballot, to be used by the voter in preparing his vote and in studying the questions upon which he is to act. (Pol. Code, sec. 1195a.) It is to be assumed that the arguments prepared by the author of the amendment state

fairly and with reasonable fullness the meaning of the amendment and the effect it is expected to produce. The argument printed and distributed with the ballot upon the amendment here under consideration refers to the fact that the Workmen's Compensation Act had been in force for several years; that section 21 of the constitution, as it was, "failed to express sanction for the requisite scope of the enactment to make a complete and workable plan," which plan embraced, as essential components, compulsory compensation for injury and death irrespective of fault, safety provisions, insurance by the state, and administration of the system, and it then states that the original section contained nothing covering safety or insurance, and only meager authority for administration; that the law in force had apparently exceeded the scope of the amendment authorizing it, and that the amendment was designed to give authority for the legislation already enacted and to sanction the plan then in existence. This obviously refers to the extensive revision of the original Workmen's Compensation Act that was enacted at the same session, as well as to the original act, neither of which attempted to create such a liability as that provided by the act of 1919. There is no suggestion in the argument that the proposed amended section was intended to authorize the legislature to impose any liability upon employers of a character different from that already provided by the original section, and nothing to suggest to any voter the idea that it was for carrying on a system for the benefit of disabled workmen in general or for the levy of contributions to support such system upon employers in whose service men having no dependents were killed by injuries received in the course of their employment. It cannot be supposed that the author of the amendment, or the legislature that proposed it, intended to provide for such a scheme as that contained in the act of 1919 by language so illy adapted to suggest the idea as that contained in this section and that the voters should be inveigled into voting for it by an argument presented to them with the ballot which does not even mention it.

In so far as the act purports to exact from employers a sum to be used by the state for disabled workmen in general, it is in reality a taxing law, a revenue measure. It requires any employer to pay to the state the sum of \$350

whenever one of his workmen who has no dependents is killed by an injury received in the course of his employment, and the fund thus raised is to be used for vocational re-education of workmen not connected in any way with such employer, and the surplus, if any, to go to pay the expenses of the state in carrying on the department or bureau administered by the Industrial Accident Commission, all of which are public purposes. This is purely a tax. "A tax is a charge upon persons or property to raise money for public purposes." (*Perry v. Washburn*, 20 Cal. 350.) A tax "includes every charge upon persons or property, imposed by or under the authority of the legislature, for public purposes." (*Madera v. Black*, 181 Cal. 310, [184 Pac. 400]; 1 Cooley on Taxation, p. 6.) The amended section of the constitution contains no suggestion of a design to provide for raising revenue by a tax of such an extraordinary character as this statute proposes. We need not consider the question whether as a tax it would not be void because of its unfair discrimination. We are of the opinion that the language of the section gives no warrant for the conclusion that it was intended to provide for taxation of any kind.

[1] Our conclusion is that section 21 of article XX, as amended in 1918, did not authorize the legislature to impose a liability on an employer to pay money to the state for the purposes specified in the act of 1919. It follows by necessity that said section gives no authority to the legislature to confer on the Industrial Accident Commission jurisdiction to determine any dispute that may arise concerning the liability of employers sought to be imposed by said act of 1919.

[2] It may be conceded that under its general powers the legislature might provide a fund for the benefit of persons disabled in industry in this state and commit the administration of the fund to the Industrial Accident Commission, and might also levy a tax in some form to raise such fund. But any disputes that might arise concerning such tax would be cognizable only by the courts established by or under the provisions of article VI of the constitution, since no section of the constitution gives the legislature power to confer jurisdiction thereof upon the Industrial Accident Commission. (*Pacific etc. Co. v. Pillsbury*, 171 Cal. 322, [153 Pac. 24]; *Western M. S. Co.*

v. *Pillsbury*, 172 Cal. 407, [Ann. Cas. 1917E, 390, 156 Pac. 491]; *Carstens v. Pillsbury*, 172 Cal. 579, [158 Pac. 218]; *Employers' L. Assur. Corp. v. Industrial Acc. Com.*, 177 Cal. 775, [171 Pac. 935].)

Counsel for the commission cite the case of *State Ind. Com. v. Newman*, 222 N. Y. 363, [118 N. E. 794], as contrary to our views as aforesaid. The case is not in point. The constitution of New York contains no provision limiting the power of the legislature of that state to create new courts or tribunals such as are contained in our article VI. The question which we have discussed, that is, the power of the legislature to confer judicial power of this character upon the Industrial Accident Commission, could not arise in New York, for that state has not the constitutional limitations upon the legislative power to create courts which give rise to the question here and control our decision thereof.

It is further claimed that authority for the imposition of this liability and for the giving of this jurisdiction to the commission is found in section 17½ of article XX, which reads as follows: "The legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this constitution shall be construed as a limitation upon the authority of the legislature to confer upon any commission now or hereafter created, such power and authority as the legislature may deem requisite to carry out the provisions of this section."

The arguments printed on the ballot for the election of 1914, at which this section was adopted, indicate that its main purpose was to authorize the establishment of a minimum wage for women and minors. Nothing whatever is said in the arguments upon any other subject except that there is a suggestion that all employers, bad as well as good, should be compelled to provide proper living and working conditions for their employees. The part of the section authorizing the legislature to "provide for the comfort, health, safety and general welfare of employees" was, as we think, intended to refer to the comfort, health, safety, and welfare of employees during the time of their employment and to have no reference to general provisions, such as are here involved, for the vocational re-education of those

who have been injured and are not able to pursue their former occupation. It certainly furnishes no authority and has no reference to authority for giving the Industrial Accident Commission power to enforce the levy of contributions upon employers for the purpose of raising revenue with which to carry on a school for the re-education of employees or for any other state purpose.

We find no ground upon which the jurisdiction of the commission can be upheld.

Many other objections are made to the constitutionality of the act, but, in view of the conclusion above stated, we deem it unnecessary to consider them.

It is ordered that the award of the Industrial Accident Commission aforesaid be annulled.

Lennon, J., Sloane, J., Wilbur, J., and Shurtleff, J., concurred.

Lawlor, J., concurred in the judgment.

Rehearing denied.

All the Justices concurred.

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[L. A. No. 6915. In Bank.—January 27, 1922.]

B. STARK, Respondent, v. M. SHEMADA, Appellant.

[1] CONTRACT—SALE OF SECOND-HAND FURNITURE—DEFAULT OF SELLER — LIQUIDATED DAMAGES — PROVISION NOT ENFORCEABLE.—A provision in a contract for the sale of the furniture and furnishings of a hotel that in the case the seller failed to deliver the furniture he was to pay the sum of five hundred dollars as a forfeit is not enforceable, notwithstanding the purchaser was an auctioneer and dealer in second-hand goods and bought the furniture for resale.

[2] ID.—SECOND-HAND FURNITURE—MARKET VALUE.—It is a matter of common knowledge that second-hand household and hotel furnishings are a commodity of extensive barter and sale, with a market value, according to their condition and quality, readily ascertainable.



- [3] **ID.—LIQUIDATED DAMAGES — STIPULATION OF PARTIES — ENFORCEMENT.**—Even where the parties to a contract for liquidated damages have by written stipulation agreed that it would be impracticable and extremely difficult to fix the actual damages, if the facts do not support such stipulation, it cannot be enforced.
- [4] **FINDINGS — SPECIAL FACTS — CONCLUSION OF LAW.**—Where the special facts upon which a finding rests are declared by the court, the ultimate finding of the court is but a conclusion of law with no better foundation than is given by the facts recited.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Reversed.

The facts are stated in the opinion of the court.

Cedric E. Johnson for Appellant.

E. F. Gerecht and C. W. Hall for Respondent.

**SLOANE, J.**—Defendant appeals from a judgment awarding plaintiff as liquidated damages the sum of five hundred dollars for breach of a contract for the sale of certain second-hand household furniture.

By the terms of the agreement defendant sold to the plaintiff the furniture and furnishings of the premises known as the Federal Hotel in the city of Los Angeles for the agreed price of one thousand seven hundred dollars. It was stipulated by the parties that should the plaintiff fail to take the goods or pay the purchase price on the 24th of January, 1919, he was to forfeit the sum of fifty dollars cash on the purchase price, and the sum of \$450 additional, which he had deposited in bank on account of said transaction; and should the defendant refuse to deliver to plaintiff the possession of the goods on said 24th of January, 1919, defendant should pay to plaintiff the sum of five hundred dollars. The defendant defaulted in the delivery of the goods on tender of performance by the plaintiff at the date stipulated.

[1] The stipulated damages, therefore, on the part of the defendant are all we are concerned with on this appeal.

The precise terms of the contract in this particular are as follows: "It is also agreed that in case the said Shemada [the defendant] fails to deliver said furniture to said B. Stark [the plaintiff] on January 24th, 1919, he is to pay

B. Stark the sum of \$500.00 as a forfeit for his failure to deliver said furniture."

Whether this stipulation is for a penalty or as liquidated damages, we are satisfied it will not support the judgment appealed from.

It is pleaded as liquidated damages in the amended complaint.

In an attempt to avoid the application of sections 1670 and 1671 of the Civil Code, wherein it is declared that, "Every contract by which the amount of damage to be paid or other compensation to be made, for the breach of an obligation, is determined in anticipation thereof" shall be void except "when, from the nature of the case it would be impracticable or extremely difficult to fix the actual damage," the amended complaint contains the following allegations:

"That the business of the plaintiff is that of an auctioneer and that the sole purpose for the purchasing of said furniture and furnishings from defendant by this plaintiff was to sell said furniture and furnishings by auction at public sale, all of which facts the defendant knew at all times mentioned herein, and the amount to be realized from said sale of said furniture and furnishings depended entirely on the conditions surrounding said public sale, and naturally the amount of the profits to be made cannot be ascertained, as there is no way to ascertain the amount that each piece of furniture or furnishings would bring at such sale; that from the nature of the case it would be impractical or extremely difficult to fix the actual damage suffered by plaintiff in case of a breach of said agreement on the part of defendant, and that fact being recognized by both parties hereto, the sum of five hundred dollars was agreed upon as the amount of damage to be paid to plaintiff by defendant in case of a breach of the terms of said agreement by defendant; that it is impractical to fix the actual damage suffered by plaintiff herein by reason of the breach of said agreement on the part of defendant because of the facts as hereinabove set forth."

There is nothing contained in these averments of the complaint to bring the stipulated damages within the exception of the Civil Code, section 1671.

The circumstance that plaintiff was an auctioneer, and that his purpose, as known to the defendant, was to sell the goods again at public auction, does not add anything to the ordinary measure of damages for breach of the contract to sell.

[2] The essential facts are that this second-hand furniture as shown by the pleadings and findings was an ordinary commodity of personal property to be bought and sold on the open market. It is a matter of common knowledge that second-hand household and hotel furnishings are a commodity of extensive barter and sale, with a market value, according to its condition and quality, readily ascertainable. The obligation of the vendor is not to guarantee the purchaser a certain future profit whether on public or private sale. His liability is fixed by statute.

The breach of an agreement to sell personal property, the price of which has not been fully paid in advance, as is the situation here, is declared by section 3308 of the Civil Code to be "the excess, if any, of the value of the property to the buyer, over the amount which would have been due the seller under the contract, if it had been fulfilled," and in estimating damages it is provided by section 3354 of the Civil Code that "the value of property to a buyer, or owner thereof deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice with reasonable diligence, for him to make such a purchase."

Circumstances may arise where, when the property is purchased for a special purpose, or has a special value, special damages may be allowed, but the facts as here pleaded and found that the goods were purchased by a dealer in second-hand furniture to be sold at auction in the line of his business does not take the case out of the general rule.

[3] Even where the parties to the contract for liquidated damages have by written stipulation agreed that it would be impracticable and extremely difficult to fix the actual damages, if the facts do not support such stipulation it cannot be enforced. (*Pacific Factor Co. v. Adler*, 90 Cal. 110, [25

Am. St. Rep. 102, 27 Pac. 36]; *Patent Brick Co. v. Moore*, 75 Cal. 205, [16 Pac. 800].)

This appeal was taken on the judgment-roll alone, and the trial court has found, in accordance with the allegations of the complaint, "that it is true that from the nature of the business of the plaintiff, and of the defendant, it would be impracticable and extremely difficult to fix the actual damage suffered by either party in the event of a failure of either party to fulfill his part of the agreement." Doubtless it is upon this fact that the learned district court of appeal, from whose decision this hearing was granted, based its judgment of affirmance. The presumption might ordinarily be indulged that facts and circumstances surrounding the transaction appeared in evidence before the trial court to support its finding. We think, however, that such presumption is precluded here from the circumstance that the court predicated its finding upon a recital of the conditions that plaintiff was an auctioneer and dealer in second-hand goods, and bought the furniture for resale, together with other reasons stated in the complaint, as the basis for the conclusion that it would be impracticable and extremely difficult to fix the actual damages.

[4] Where the special facts upon which a finding rests are declared by the court the ultimate finding of the court is but a conclusion of law with no better foundation than is given by the facts recited. (*Ions v. Harbison*, 112 Cal. 260, [44 Pac. 572]; *Niles v. Edwards*, 90 Cal. 10, [27 Pac. 159, 296]; *Klein v. Lewis*, 41 Cal. App. 463, [182 Pac. 789].) As already pointed out, the conditions under which this stipulation for liquidated damages was given, and as recited in both the complaint and the findings, do not support the judgment for damages.

There are other specifications of error advanced by appellant, but, as the judgment must be reversed on the ground discussed, it is unnecessary to consider them.

The judgment is reversed.

Lennon, J., Waste, J., Shurtleff, J., Lawlor, J., and Shaw, C. J., concurred.

WILBUR, J., Concurring.—I concur.

Under sections 3308 and 3314 of the Civil Code the measure of damages for the failure to deliver personal prop-

erty sold is fixed by law and thus rendered definite and certain. The parties cannot, by stipulation or agreement that such damages are in fact uncertain, nor can the court by so finding, render uncertain that which the law has thus fixed.

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[L. A. No. 6488. In Bank.—January 27, 1922.]

**ELIZABETH M. MONSCH, Appellant, v. MARIE JULIE PELLISSIER, Respondent.**

- [1] **NEGLIGENCE—INJURY FROM DEFECTIVE LIGHT-WELL IN SIDEWALK —LIABILITY OF OWNER—PLEADING—SUFFICIENCY OF COMPLAINT.—** A complaint in an action for an injury received by a pedestrian from stepping into a hole in a light-well in the sidewalk in front of the defendant's building stated a cause of action where it was alleged that the well was kept and maintained by the defendant for her sole and exclusive benefit and that the defendant knew, or by the use of ordinary diligence should have known, of the defective condition of the well, and it was not necessary to allege that defendant had been given twenty-four hours' notice by the proper municipal authority to repair the defect, as provided in the Vrooman street law.
- [2] **ID.—REPAIR OF SIDEWALK — LIGHT-WELLS — DUTY OF PROPERTY OWNER.—**A property owner who maintains light-wells in the sidewalk in front of her building for the purpose of supplying light to the basement thereof is under an obligation to keep the gratings and glass blocks of which the wells consist in a condition which will render the sidewalk, of which they form a part, reasonably safe for use by those who may pass over it.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Reversed.

The facts are stated in the opinion of the court.

Ford & Bodkin and Jos. J. Herlihy for Appellant.

Geo. J. Denis for Respondent.

**SHURTLEFF, J.**—The amended complaint alleged that defendant kept and maintained for her own use and benefit an area or vault under the sidewalk in front of and adjoin-

ing her property in the city of Los Angeles; that in the sidewalk over and above said area or vault defendant kept and maintained light-wells consisting of iron grating and inlaid glass for her sole and exclusive use and benefit, for the purpose of supplying light to said vault and area and to the basement of her building standing upon her said property; that said light-wells were maintained by defendant in a negligent and dangerous condition in that large portions of the inlaid glass were broken out or chipped, leaving holes in the surface thereof, and that in other portions of the same the glass had been replaced with boards. It was further alleged that the defendant knew, or by the use of ordinary care or diligence should have known, of the condition of these light-wells; that plaintiff, while passing over and upon said light-wells, stepped into a hole in one of them, causing her to fall violently to the sidewalk, with the result that her left shoulder and her left hip were fractured and her nervous system seriously shocked.

To this complaint defendant interposed a demurrer, which was sustained without leave to amend, the plaintiff having declined to make further amendment. Thereupon judgment was entered for defendant, from which judgment plaintiff takes this appeal.

[1] Both parties agree that the sole question in the case is, whether, under the facts alleged, the defendant is responsible for the said injury sustained by plaintiff. The respondent contends that the complaint is insufficient because of the absence therefrom of an allegation that the board of public works of the city of Los Angeles had, prior to the accident, received notice of the alleged dangerous condition of the sidewalk, or that the defendant was ever notified by said board that the same was in a condition requiring repairs or reconstruction. This position is predicated upon the Vrooman Act and acts amendatory thereto, and *Martinovich v. Wooley*, 128 Cal. 141, [60 Pac. 760], which holds that the street law does not impose a liability upon the owner for personal injuries resulting from the nonrepair of the sidewalk in front of his lot, unless, as required by said act, the defect continues after the lapse of twenty-four hours or more from the time of the giving of the statutory notice thereof by the proper officer, which in that case was the superintendent of streets, and in this the board of public works,

but we do not think the Martinovich case is controlling here. What is there decided must be read in the light of the facts which the case presented. There the injury was due to a "decayed and rotten" plank in the sidewalk, which was essentially a component part and portion of the structure and placed therein solely and entirely for the use of the public, and not, as here, for the special accommodation of the owner and his property. In the instant case the grating and glass became part of the surface of the sidewalk over which pedestrians could walk, but it performed an additional and distinct office, namely, the passage of light to the basement of the defendant's building, in which use it was, as such, no part of the sidewalk. The fact that what may be termed its secondary use was to provide light, as stated (the same being for defendant's sole benefit), should not relieve her from keeping the light-well in safe repair, even though the primary use of the sidewalk is for the public to walk over, and is, in such use, under the supervision of the city. Moreover, as we have said, the complaint alleges, which upon demurrer must be taken as true, that the light-wells were kept and maintained by defendant for her sole and exclusive use.

[2] Inasmuch, therefore, as the light-wells, as such, were, as we have seen, constructed for the benefit of defendant and her property and for a use independent of and apart from the ordinary and accustomed use of the sidewalk, the law casts upon her the duty, to be discharged with reasonable care, of keeping it in proper and safe condition. (*Trustees etc. v. Foster*, 156 N. Y. 354, [66 Am. St. Rep. 575, 41 L. R. A. 554, 50 N. E. 971].) The case last cited was an action by the trustees of the village of Canandaigua for the amount of a judgment that had been recovered against it in a suit by a party who had been injured by the giving away of a grating in the sidewalk in front of defendant's property, because, so it was claimed, the grating was insecure by reason of the want of reasonable care on the part of defendant to keep it in proper repair. In rendering its decision, the court said: "It [grating] was built for his [defendant's] accommodation and was a benefit to his property only, and the law placed upon him the obligation of using due care to keep it in a suitable and safe condition for the public to walk over as a part of the sidewalk. Proper con-



struction, in the first place, was not enough to relieve him from liability; but the duty of inspection and repair continued while he owned and was in the exclusive possession of the premises. The duty ran with the land as long as the grate was maintained for the benefit of the land. . . . While the owner cannot be held liable in this action for failing to repair the entire sidewalk in front of his premises, was he properly held liable for failing to keep in repair the grate itself, which was his own structure? This depends upon the duty that he assumed when he cut a hole in the sidewalk and covered it with the grate. That duty included proper construction in the first place, and reasonable care on the part of the owner to keep the grate in repair thereafter, as long as he continued in possession. The duty sprang from the necessity of having safe sidewalks and, as the necessity is continuous, so is the duty. Upon no other ground can the construction of a grate in a sidewalk, which is an interference with a public highway, be justified, even when permission is duly granted."

Respondent in her brief refers to certain averments in her answer to the original complaint, to the effect that the sidewalk in question was constructed under the provisions of the Vrooman Act, March 18, 1885, and was accepted by the superintendent of streets of the city of Los Angeles, or by the board of public works, his successor. But such averments will not be considered when passing upon the demurrer to the complaint. As we view the liability of the defendant under the facts as stated in the amended complaint, it is entirely separate from, and independent of, the city, and the latter's obligation to keep the sidewalk in proper repair. It is an original responsibility resting upon defendant to keep the gratings and lights in a condition which will render the sidewalk, of which they form a part, reasonably safe for use by those who may pass over it.

We cannot concede that defendant, having knowledge of the dangerous condition of the gratings and their resultant menace to the safety of the general public, could shut her eyes to the necessity of repairing them until such time as someone was injured, and then avoid liability by pleading that she had not received the twenty-four hours' notice required by the Vrooman Act. In other words, under the facts of this case, the duty was, in the first instance, inde-

pendent of notice to or by the city, cast upon the defendant to repair the gratings. It is only where there is no liability whatever *until* service thereof that the notice we are discussing must be given. In the latter case the service of the notice lies at the very foundation of the liability and its enforcement, which is not the situation here. Moreover, an examination of the photograph attached to the complaint as an exhibit depicts the gratings apparently in a condition which might render them in their character "of the nature of a nuisance" (*Barry v. Terkildsen*, 72 Cal. 254, [1 Am. St. Rep. 55, 13 Pac. 657]; *Spence v. Schultz*, 103 Cal. 208, [37 Pac. 220]), in which event defendant, who was responsible for their presence and had knowledge of their condition, as it is alleged she did, for a long time prior to the injury to plaintiff, or, by the exercise of reasonable diligence, would have known of it, should not escape liability upon the ground that she had not received statutory notice of the existence of such nuisance.

We think the amended complaint stated a cause of action, and that the court below erred in sustaining the demurrer.

Judgment reversed.

Sloane, J., Wilbur, J., Lawlor, J., Lennon, J., and Shaw, C. J., concurred.

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## MEMORANDUM CASE.

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[S. F. No. 9695. In Bank.—December 9, 1921.]

SAN FRANCISCO BUREAU OF GOVERNMENTAL RESEARCH (a Corporation), Petitioner and Appellant, v. BOARD OF PUBLIC WORKS OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Appellants.

[1] PUBLIC RECORDS — INSPECTION OF DATA IN OFFICE OF CITY ENGINEER — SAN FRANCISCO HETCH HETCHY PROJECT. — Judgment modified and affirmed on the authority of *Coldwell v. Board of Public Works of the City and County of San Francisco et al.*, ante, p. 510.

APPEALS from a judgment of the Superior Court of the City and County of San Francisco. George E. Crothers, Judge. Modified and affirmed.

The facts are the same as those stated in the opinion in the case of *Coldwell v. Board of Public Works of the City and County of San Francisco et al.*, ante, p. 510.

Robert B. Gaylord for Petitioner and Appellant.

George Lull and Robert M. Searls for Defendants and Appellants.

LAWLOR, J.—This is a companion case to *Coldwell v. Board of Public Works of the City and County of San Francisco et al.*, ante, p. 510, [202 Pac. 879], and the same issues are involved here as were involved in that case. The two cases were tried together, the pleadings are identical except for necessary minor differences, the judgments are the same, and on appeal the briefs of the respective parties were consolidated.

Petitioner here is alleged to be a nonprofit corporation, having no capital stock, organized under the laws of California, with its principal place of business in San Francisco,

and is a citizen of the city and county of San Francisco. The objects and purposes of petitioner, as set forth in the petition, are "to act as an unincorporated, nonpolitical, nonprofit-making citizens' agency for securing the highest obtainable degree of efficiency and economy in the transaction of public business, particularly in the municipality of San Francisco, through investigating, collecting, classifying, studying, and interpreting facts concerning the powers, duties, actions, limitations, methods, and problems of the several departments of government, and making such information available to public officials and citizens, and promoting the development of a constructive program for the city and county of San Francisco that shall be based upon adequate knowledge of community needs, thereby encouraging economy and efficiency in the conduct of public business in order that the taxpayers may be assured full return value in services rendered for taxes paid and money spent in governmental cost payments." Defendants make no objections to the interest of the petitioner in the data which is sought to be inspected other than those advanced in the case of *Coldwell v. Board of Public Works et al.*, *supra*.

[1] On the authority of that case, the judgment in the case at bar is modified to omit from the writ the exception of all confidential reports, estimates, or data collected or compiled by assistants or other engineers for the use of the city attorney or other attorneys representing the city and county of San Francisco in legal proceedings, and, as so modified, the judgment is affirmed.

Shaw, C. J., Lennon, J., Wilbur, J., Sloane, J., Shurtleff, J., and Waste, J., concurred.

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**ALIENATION OF AFFECTIONS (Continued).**

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**ALIENS.** See Constitutional Law, 1, 3; Taxation, 1; United States Government, 3, 5.

**APPEAL.**

1. **JUDGMENT—FINDINGS—PRESUMPTION.**—A judgment or decree cannot be reversed for want of a finding, where the answer does not set forth any defense, as error is never presumed, and all intentions are in favor of the judgment. (Estate of Aufret, 34.)
2. **PROCEEDING FOR COLLECTION OF INHERITANCE TAX—INHERITANCE TAX ACT.**—There is a right to appeal from the decision in a proceeding under the Inheritance Tax Act (Stats. 1913, p. 1078) by the state controller for the determination of liability to taxation under the act. (Chambers v. Hathaway, 104.)
3. **QUIETING TITLE—APPEAL BY PART OF DEFENDANTS—REVERSAL OF JUDGMENT—NONAPPEALING DEFENDANTS.**—In an action to quiet title in which plaintiff's title is based on a school land certificate and the defendants, who are tenants in common, claim under another certificate, the controversy being as to the validity of the respective certificates, where the lower court held plaintiff's certificate valid giving him judgment, the appellate court has no power in reversing the judgment upon an appeal by part of the defendants only to order a retrial of the issues as to all of the defendants. (Lake v. Superior Court, 116.)
4. **RIGHTS OF NONAPPEALING DEFENDANTS—INTERESTS NOT ADVERSE.**—While the rights of nonappealing defendants in such a case would be affected by a reversal of the entire judgment, their interests were in no sense adverse to the appellants, and their rights would not be affected by a reversal of the judgment as to the appealing

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**APPEAL (Continued).**

- defendants, as the rights of the several defendants were separate and distinct. (Id.)
5. **RETRIAL—UNDIVIDED INTERESTS.**—A retrial of such case can be had with relation to the undivided interest claimed by the appealing defendants without in anywise affecting the rights of the plaintiff and nonappealing defendants as determined by the previous judgment. (Id.)
  6. **REVERSAL—APPLICATION OF ORDER.**—The broad expression "the judgment is reversed" will be confined to the issues arising upon the appeal and the parties appealing. (Id.)
  7. **APPEAL FROM PORTION OF JUDGMENT.**—An appeal from a judgment by some of the defendants, although the notice of appeal is general in its terms, is of necessity an appeal from only that portion of the judgment which injuriously affects the appealing defendants, and is thus, in effect, an appeal from a portion of the judgment—that is to say, the portion of the judgment adverse to their interests, unless reversal or modification of the whole judgment is essential to protect the interests of the appealing defendants. (Id.)
  8. **REVIEW OF PART OF JUDGMENT—JURISDICTION.**—Upon an appeal from a portion of a judgment only the appellate court has no jurisdiction to review any part of the judgment, except the part to which the appeal is directed, and an order of reversal, although general in terms, will be construed to apply only to the part brought up for review. (Id.)
  9. **CONFLICTING EVIDENCE—FINDINGS.**—Where the evidence is sufficient as a matter of law, and presents a substantial conflict, the findings will not be disturbed on appeal. (McCully v. McArthur, 194.)
  10. **MOTION TO DISMISS CROSS-COMPLAINT AND SEPARATE DEFENSE—FAILURE TO OBJECT—WAIVER.**—In such case, where no objection was made by plaintiff to the granting of motions by defendant at the close of the trial to dismiss the cross-complaint and separate defense without prejudice, the question cannot be raised for the first time on appeal. (Id.)
  11. **JUDGMENTS—CONCLUSION OF LAW.**—An erroneous conclusion of law does not constitute a cause of reversal if the judgment is right. (McNutt v. City of Los Angeles, 245.)
  12. **ASSIGNMENTS OF ERROR—INSUFFICIENCY OF.**—Assignments of error to findings "on the ground that the court would not allow any evidence on those issues," with a mere reference to the transcript on appeal for certain rulings of the court on the admission and rejection of testimony, but without attempt to print in the briefs those portions of the record, or to show wherein the errors, if any, lie, do not conform to the requirements of section 953c of the Code of Civil Procedure. (Parsons v. Segno, 260.)

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**APPEAL (Continued).**

13. **NOTICE—FAILURE TO NAME COURT.**—In view of the fact that the only court in which an appeal in any case can be heard is determined by constitutional provision, and in view of the further constitutional provision that no appeal taken to the supreme court or to a district court of appeal shall be dismissed for the reason only that the same was not taken to the proper court, an appeal will not be dismissed because the notice of appeal did not state to what court the appeal was taken. (*Rabe v. Lloyd*, 282.)
14. **CONTRACT BY DECEASED PERSON—PERFORMANCE BY EXECUTORS—APPEALABLE ORDER.**—An order made under section 1597 et seq. of the Code of Civil Procedure directing executors of a will to transfer and deliver to a third party certain assets of the estate, based on a contract for the sale thereof alleged to have been made by the testator, is an appealable order, although not specified as such in subdivision 3 of section 963 of the Code of Civil Procedure, specifying the probate judgments and orders from which an appeal may be taken. (*Estate of Cheda*, 322.)
15. **QUESTION NOT RAISED IN LOWER COURT.**—A question not raised in the lower court cannot be determined on appeal. (*Imperial Valley L. Co. v. Globe G. & M. Co.*, 352.)
16. **FINDINGS OUTSIDE OF ISSUES.**—Findings outside of the issues raised by the pleadings and those actually submitted to and tried by the court should be disregarded. (*Id.*)
17. **JUDGMENTS—PRESUMPTION.**—On appeal, presumptions are indulged in favor of judgments. (*Id.*)
18. **MISCONDUCT OF COUNSEL—TIMELY OBJECTION.**—Misconduct of counsel in argument to the jury must be made at the time as a basis for complaint in the appellate court. (*People v. Steelik*, 361.)
19. **JUDGMENT OF DISMISSAL—POINT RAISED BY DEMURRER—FAILURE TO MENTION IN BRIEF.**—Where, on an appeal from a judgment of dismissal entered after demurrer sustained without leave to amend, the respondent fails to mention in her brief the point of defect of parties raised by the demurrer, it will be regarded as abandoned. (*Platner v. Vincent*, 443.)
20. **NOTICE—DATE OF ENTRY OF JUDGMENT—INCORRECT RECITAL.**—An appeal from a judgment of dismissal after the sustaining of a demurrer to the complaint without leave to amend is not open to the objection that the appeal was taken from the order sustaining the demurrer, and not from the judgment, because the notice incorrectly recited the date of the entry of the judgment as being the date on which the demurrer was sustained, where but one judgment was entered and the notice gave the correct book, page, and date of entry thereof. (*Oberkotter v. Woolman*, 500.)

**APPEAL (Continued).**

21. **FINDINGS—INSUFFICIENCY OF EVIDENCE—SPECIFICATION.**—Where a bill of exceptions contains nothing which even purports to specify wherein the evidence fails to sustain any of the findings, the contention that the findings are not supported by the evidence cannot be considered. (*Gosliner v. Briones*, 557.)
22. **FINDING—CONFLICT OF EVIDENCE.**—A finding on testimony which is substantially conflicting cannot be disturbed by the appellate court whatever the views of the court as to the comparative strength of the testimony to the contrary. (*Hotaling v. Hotaling*, 695.)
23. **TESTIMONY OF ATTORNEY—CONSIDERATION ON APPEAL.**—The testimony of an attorney in behalf of his client, so far as the appellate court is concerned, is to be received and considered as that of any other witness, in view of the inherent quality of his testimony, his interest in the case, and his appearance on the witnessstand. (*Id.*)
24. **RULING ON EVIDENCE—REVIEW—INSUFFICIENT ARGUMENT.**—Alleged error in refusing a motion to strike out testimony of a witness will not be considered where the only argument in support of the contention is a mere reference thereto in the brief followed by the assertion that no citation of authority is required to establish the error. (*Frazier v. David*, 724.)
25. **REQUEST FOR PREPARATION OF TRANSCRIPT—RELIEF FROM DEFAULT.** Where on the hearing of a motion to dismiss an appeal from a judgment upon the ground that no written request for a transcript of the record, as required by section 953a of the Code of Civil Procedure, had been filed, it appeared that a transcript had been prepared without such request and certified to by the trial judge subject to the qualification that no request for its preparation had been made, the appellate court, having acquired jurisdiction of the appeal by the notice of appeal and undertaking, properly continued the motion to permit the appellant to apply to the trial court for relief under section 473 of such code, and where such relief was granted, the motion to dismiss the appeal was properly denied. (*Morey v. Paladini*, 727.)

See Accounting, 4; Assignments, 6; Criminal Law, 34–36; Divorce, 3, 8; Estates of Deceased Persons, 14; Findings, 3; Guardian and Ward, 2, 4; Juries and Jurors, 2; Landlord and Tenant, 2; Law of Case, 1; Mortgages, 1, 2; Negligence, 20, 21, 24; Pleading, 1; Vendor and Vendee, 7.

**ARGUMENT.** See Appeal, 18; Negligence, 27.

**ASSESSMENTS.** See Superior Court, 2, 3, 7, 8; Taxation, 2, 3.

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**ASSIGNMENTS.**

1. **CHOSE IN ACTION—PARTIES.**—An assignee of a chose in action may bring suit thereon in his own name. (Ralph v. Anderson, 45.)
2. **COLLISION OF AUTOMOBILES—CAUSE OF ACTION FOR NEGLIGENCE—ORAL ASSIGNMENT.**—Since there is no statutory provision requiring an assignment of a claim for damages to an automobile, alleged to have resulted from negligence in a collision, to be in writing, parol evidence of the transfer is admissible. (Id.)
3. **WITNESSES—TESTIMONY OF ASSIGNOR.**—In a suit by the assignee upon a claim so assigned, the oral testimony of the assignor himself to the effect that he has transferred his claim is sufficient to bind the assignor and support a finding that an assignment has been made. (Id.)
4. **PARTIES—COLLATERAL AGREEMENT WITH REFERENCE TO RECOVERY.** Provided the assignment in such a case, whether verbal or written, is absolute so as to vest the apparent legal title in the assignee, the latter is entitled to sue in his own name, whatever arrangements may have been made between him and the assignor respecting the proceeds, as the debtor is completely protected by the assignment. (Id.)
5. **INTEREST OF THIRD PARTY IN CLAIM—EVIDENCE—ADMISSIBILITY OF.** In an action by the assignee upon an assigned claim for damages to an automobile alleged to have occurred by defendant's negligence, evidence of the interest in the claim of an insurance company in which both the assignor and assignee were insured is admissible subject to plaintiff's connecting this interest with the present action by proof of his authorization to sue. (Id.)
6. **EVIDENCE—APPEAL.**—In an action upon an assigned claim where the trial court found, upon ample evidence, that plaintiff sustained the burden of proving a direct assignment of the claim, defendant cannot upon appeal raise objection that certain evidence is lacking when his attorneys are responsible for its omission, nor can he complain that the case was tried upon an erroneous theory when the court and parties were led into the acceptance of that theory by defendant's own counsel. (Id.)

See Deeds, 13; Mortgages, 3.

**ATTACHMENT.** See Bonds, 1, 4, 5; Estates of Deceased Persons, 3.

**ATTORNEY AND CLIENT.**

**ATTORNEY AT LAW—EVIDENCE—WITNESS.**—The propriety of a lawyer occupying the dual capacity of attorney and witness is purely one of legal ethics largely to be determined by the attorney's own conscience, and while it is not a practice to be encouraged, it may

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**ATTORNEY AND CLIENT (Continued).**

often occur that conditions exist in which an attorney cannot justly or fairly withhold from his client either his legal services or his testimony as a witness. (*Hotaling v. Hotaling*, 695.)

**ATTORNEY AT LAW.** See Appeal, 23; Estates of Deceased Persons, 4.

**ATTORNEY'S FEES.** See Account Stated, 4.

**AUTOMOBILES.** See Negligence, 22.

**AWARD.** See Workmen's Compensation Act, 5.

**BAILMENTS.**

1. **ACTION FOR DAMAGES—DESTRUCTION OF LUMBER BY FIRE—NOTICE OF NONLIABILITY.**—Where a wharf and storage company notified a lumber company that there would be a strike of the longshoremen and wharf handlers on a certain date, that it would not receive a shipment of lumber for storage after that date, except subject to its not assuming any responsibility for delivery, or loss, or damages, or theft, or any cause whatever of that nature, until the strike was over and it was in a position to handle the same, and, with said understanding, shortly after the date of the strike the lumber was removed from a steamer by the master and piled in the rough upon the wharf for the express purpose of having the same stored by the wharf and storage company, the terms of the notice of nonassumption of liability were amply sufficient to cover a loss of the lumber by fire. (*Northwestern M. F. Assn. v. Pacific Co.*, 38.)
2. **NEGLIGENCE—NONLIABILITY—CONTRACT FOR.**—A depositary or bailee for hire in the course of his ordinary business cannot relieve himself by contract or notice from responding in damages for loss arising from his own negligence, or that of his agents or servants. (*Id.*)
3. **RIGHT TO REFUSE GOODS FOR STORAGE EXCEPT ON CONDITIONS.**—A wharf and storage company, anticipating a strike of longshoremen and wharf handlers, and having reason to believe that its facilities for handling business would be so disturbed as to render it unsafe to assume the usual risks, has the right to refuse to accept goods in storage except on condition of being released from liability for damages that might in any way be traceable to such disorganized conditions. (*Id.*)
4. **DEGREE OF CARE REQUIRED.**—Nothing short of gross or wanton negligence would make a wharf and storage company responsible for the loss of lumber placed on its wharf with the express understanding that it would be relieved from all liability, a strike being



**BAILMENTS (Continued).**

threatened which would disorganize its usual business, and that the owner of the lumber would take all of the risks if permitted to pile its lumber there awaiting storage. (Id.)

5. **CONTRACT FOR NONLIABILITY—PUBLIC POLICY—VALIDITY OF CONTRACT.**—A contract between a wharf and storage company and a lumber company by which the former permitted the latter to place its lumber on the wharf of the former for the purpose of storing it, upon the express understanding that, in view of the fact that a strike of longshoremen and wharf handlers was threatened which would disorganize the business, the former should not be in any way liable, is not against public policy, but the contract is binding upon the parties and operates to relieve the storage company from negligence of its employees while in its service. (Id.)

See Contracts, 6, 7; Negligence, 16.

**BILL OF EXCEPTIONS. See Appeal, 21.****BONDS.**

1. **RELEASE OF ATTACHMENT—CONSTRUCTION OF.**—The effect of a bond providing that a surety company in consideration of the release from attachment of certain property undertakes in a certain sum and promises that in case the plaintiff recovers judgment in the action the defendant will, on demand, pay to plaintiff the amount of whatever judgment may be recovered in the action, together with interest and costs, is that the surety company guarantees the payment by the defendant on demand of any judgment recovered in said action, and, on default in such payment, to indemnify the plaintiff to the amount of the judgment, not to exceed the sum named. (Turner v. Fidelity & Deposit Co., 76.)
2. **GUARANTORS AND SURETIES—ALTERATION OF CONTRACT—RELEASE.**—It is the settled law of this state that a guarantor or surety may stand upon the strict terms of his contract, and that any unauthorized alteration of the obligation assumed, whether detrimental to the guarantor or not, releases him from liability. (Id.)
3. **ACTION ON BOND—AMENDMENT OF PLEADINGS.**—In an action upon such a bond, unless amendments to the complaint are such as to substitute new or different parties, or to state a new and independent cause of action, the sureties or guarantors are bound by the judgment. (Id.)
4. **OBLIGATION—AMENDMENT OF PLEADINGS.**—In an action upon a bond given to release an attachment, where the contract of the surety company is that the defendant will pay to plaintiff the "amount of whatever judgment may be recovered in said action," the obligation which it is sought to enforce against the principal

## BONDS (Continued).

through the suit and judgment is the payment of the liability arising under the contract set out in the complaint, and the plaintiff is not estopped by his original complaint from making any corrections or supplying any omissions by amendment which are proper or necessary to fully set forth the liability of the defendant under the contract sued upon. (Id.)

5. **SURETYSHIP—DEATH OF PRINCIPAL—LIABILITY OF SURETY.**—A bond given to release an attachment is not exonerated, nor the right to recovery suspended, by the death of the principal and the prosecution of the action to judgment against the administrators of his estate. (Id.)
6. **RIGHTS OF SURETY—CONSTRUCTION OF BOND.**—While the rule is that a surety may rely upon the strict terms of his contract, there is no reason in law or equity why the same liberality of construction and interpretation of those terms should not be applied as in construing any other contract. (Id.)
7. **SURETIES—RECOVERY ON CONTRACTOR'S BOND—PLEADING—PERFORMANCE BY OWNER.**—In an action by an owner against the sureties on the bond of a building contractor for breach of the condition of the bond that the sureties would pay all liens placed upon the property arising from the performance of the work or the furnishing of materials in connection therewith, it is not necessary for the plaintiff to allege that he had performed the contract upon his part, since the undertaking was that the contractor and not the owner would perform. (Blackwood v. McCallum, 655.)
8. **MODIFICATION OF CONTRACT—INSUFFICIENCY OF ANSWER.**—In an action by an owner against the sureties on a building contractor's bond to recover money paid to lien claimants to protect the property from execution sale, an averment in the answer that the building was erected in accordance with, and pursuant to, a new and different contract from that for the faithful performance of which the defendants became sureties is not the statement of an ultimate fact, but of a conclusion of law. (Id.)
9. **CHANGES IN CONTRACT—DEPARTURE FROM PRESCRIBED METHOD—PROVISION OF BOND—SURETIES NOT EXONERATED.**—While an owner and a building contractor may, as between themselves, waive the method prescribed by the contract for making certain changes and alterations in the work, such waiver is not binding on the sureties without their consent, but such consent is shown where the bond provides that such changes and alterations may be made without their consent and that they shall not be released from liability thereby. (Id.)

See Estates of Deceased Persons, 3; Mortgages, 1; Municipal Corporations, 1, 3, 5.

**BOUNDARIES.**

1. **UNCERTAINTY OF TRUE LOCATION—AGREED LINE.**—When two adjoining owners of land, being uncertain as to the true location of the boundary line between their contiguous land, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the period of the statute of limitations, or under such circumstances that substantial loss will be caused by a change of its position, such line becomes in law the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements, notwithstanding the true position of the dividing line could always have been determined by a correct measurement or by a survey. (Nusbickel v. Stevens Ranch Co., 15.)
2. **INTENTION OF ADJOINING OWNERS—EXTENT OF CLAIMS—CONSISTENCY WITH DOCTRINE.**—The doctrine of agreed boundaries is not nullified by the fact that adjoining owners never intended to claim anything beyond the true line. Such intention is entirely consistent with the doctrine. (Id.)

See Public Lands, 5.

**BUILDING CONTRACTS.** See Bonds, 7, 9.

**BUILDING RESTRICTIONS.**

1. **CONDITION SUBSEQUENT—BREACH—DEFEAT OF TITLE.**—Where a contract of sale of land and a deed executed in pursuance thereof both contained the "express condition," that "no residence, hotel, church or schoolhouse shall be erected or maintained on the property last above described of a less value than" a certain sum, and provided, further, that "in the event of a violation of any of these conditions or reservations this instrument shall become null and void, the grantee herein shall forfeit all right of title to said property and all interest therein shall revert without notice to the grantor herein," and that the stipulations should apply to and bind the heirs, executors, administrators, and assigns of the respective parties, the restriction clause must be construed as a condition subsequent, a breach of which may defeat the purchaser's title. (Los Angeles etc. Land Co. v. Marr, 126.)
2. **RIGHT TO RECONVEYANCE—CONTINGENT ESTATE—TRANSFERABILITY OF.**—A right to the reconveyance of property upon breach of a condition subsequent, such as reserved in the contract and deed in question, is a contingent estate which may be transferred. (Id.)
3. **REVERSION OF TITLE—PARTIES.**—While conditions in a contract of sale of, and deed to, land, prohibiting the erection of a building thereon of less than a certain value and providing that in the event of a violation of the conditions or reservations there shall

**BUILDING RESTRICTIONS (Continued).**

be a forfeiture of all right or title to the property and all interests shall revert to the grantor, are valid, they can be enforced only at the instance of one who has not waived his right to maintain such an action. (Id.)

4. **WAIVER OF RIGHT—DEFENSE.**—Waiver of the right to enforce such a building restriction is recognized as a valid defense to an action to enforce a forfeiture for breach of the condition. (Id.)
5. **ERECTION OF PROHIBITED BUILDING—WAIVER OF BREACH.**—In an action to declare a forfeiture of title to land for breach of a building restriction where the uncontradicted evidence showed that the building remained on the lot without objection for nearly three years and that about a year after the building was erected the seller accepted payment of the purchase price and delivered a deed of the property to the purchaser, with knowledge of the existence of the building and without complaint concerning the same, the evidence clearly established a waiver of the grantor's right to enforce a forfeiture. (Id.)

See Findings, 2.

**CARE.** See Contracts, 7; Innkeepers, 5.

**CERTIORARI.** See Writ of Review, 1, 2.

**CHARTERS.** See Counties, 3, 4.

**CITIES.** See Municipal Corporations.

**CLAIMS.** See Estates of Deceased Persons, 9.

**COLLATERAL ATTACK.** See Criminal Law, 38.

**COMMON CARRIERS.**

1. **CONVERSION OF SHIPMENT—PLEADING—EVIDENCE.**—Where, in an action for the conversion of goods while they were in the possession and under the control of the defendant as a common carrier between the point of shipment and the point of destination of the goods, the complaint alleged that the defendant was a carrier and that it unlawfully and wrongfully sold the goods without the plaintiff's knowledge and contrary to his instructions, the plaintiff could only recover upon proof either that the defendant sustained the relation of carrier of the goods at the time of their conversion, or had so contracted with plaintiff as to be liable for loss by any other carrier or bailee. (McCaslin v. Southern Pac. Co., 716.)
2. **TRANSPORTATION OF GOODS BEYOND LINES—LIABILITY—COMMON LAW.**—A common carrier by the acceptance of goods for transportation over its railroad lines to their destination and thence over

**COMMON CARRIERS (Continued).**

the connecting lines of other carriers to the destination of the goods does not have imposed upon it by common law any liability as a carrier of such goods beyond the terminal of its own lines. (Id.)

**3. NONLIABILITY UNDER FEDERAL LAW—CARMACK AMENDMENT—CUMMINGS ACT.**—The Carmack Amendment to the Interstate Commerce Act making initial carriers liable for loss of shipments by connecting carriers did not apply to a shipment whose destination was outside of the United States, and the Cummings Act, which replaced such amendment and had the effect of extending the liability of an initial carrier so as to cover losses upon connecting lines, is not applicable to a foreign shipment made before the enactment. (Id.)

**4. CONVERSION BY CONNECTING CARRIER—BILL OF LADING—LIMITATION OF LIABILITY OF INITIAL CARRIER.**—Under a bill of lading issued by an initial carrier upon receipt of a shipment of goods to a point beyond the destination of its own lines, no recovery can be had for a conversion of the goods by a connecting carrier, where the instrument expressly limits liability to carriage over its own lines. (Id.)

**5. ACTION FOR CONVERSION—LIABILITY OF INITIAL CARRIER—THEORY OF NEGLIGENCE—PLEADING.**—In an action against an initial carrier for damages for conversion of goods by a connecting carrier in selling the same for transportation charges after refusal of acceptance by the consignee, the plaintiff cannot recover on the theory that the defendant was negligent in failing to notify the connecting carrier that it held, as alleged in the complaint, an indemnity bond for payment of the freight charges, since such averment was necessary in order to show that the sale was wrongful. (Id.)

**COMMUNITY PROPERTY.**

**1. SECTION 164 OF THE CIVIL CODE—STATUTORY CONSTRUCTION.**—Two rules have been uniformly adhered to in the interpretation of section 164 of the Civil Code and its amendments: First, that the law has been construed as applying only to property acquired in California, or by persons domiciled here; and second, that amendments are not to be construed as retroactive, unless the language thereof compels such a construction. (Estate of Frees, 150.)

**2. PROPERTY ACQUIRED IN OTHER STATES—STATUS OF.**—Notwithstanding the definition of community property has in terms included all property acquired by the husband or wife after marriage, other than that acquired by gift, bequest, devise, or descent, it has uniformly been held that property acquired in other states by persons domiciled therein and subsequently brought to California by them at the time of establishing residence in this state, retained

**COMMUNITY PROPERTY (Continued).**

the status that it had in the state where it was acquired, regardless of our definition of community property. (Id.)

3. **PROPERTY ACQUIRED OUTSIDE OF STATE—CONSTRUCTION OF SECTION 164 OF THE CIVIL CODE.**—The clause of section 164 of the Civil Code, as amended in 1917, referring to personal property, construed prospectively and not retrospectively, as required by our code and by our decisions, should read that personal property wherever situated (thereafter) acquired by a person while domiciled elsewhere which would not have been the separate property of either husband or wife, if acquired while domiciled in this state, is community property; and so construed all personal property owned by a decedent at the time of his removal to California in 1910 would be his separate property according to the law in force at that time, and would be unaffected by the amended definition of community property of 1917, where the property was separate property under the law of the state in which it was acquired. (Id.)
4. **SECTION 1402, CIVIL CODE—INHERITANCE TAX ACT OF 1917.**—Section 1402 of the Civil Code, providing for the succession to the community property of a decedent, would have no application to such separate property, and section 1 of the Inheritance Tax Act of 1917, which refers only to the community property to which the wife would succeed under section 1402 of the Civil Code, would have no application to such separate property. (Id.)
5. **REBUTTAL OF PRESUMPTION—DEGREE OF PROOF.**—While the presumption of community property created by section 164 of the Civil Code can only be overcome by clear and satisfactory proof, it is incumbent on the party seeking to rebut the presumption to do no more than to produce such legal evidence as, under all the circumstances of the particular case, would ordinarily produce conviction to an unprejudiced mind. (Estate of Nickson, 603.)
6. **DETERMINATION OF SUFFICIENCY OF EVIDENCE—QUESTION FOR TRIAL COURT.**—Whether or not the evidence offered to overcome the presumption of community property is clear and convincing is a question for the trial court, and its determination upon conflicting evidence is not open to review on appeal. (Id.)
7. **SEPARATE PROPERTY—SUFFICIENCY OF EVIDENCE.**—In this proceeding on final distribution, involving the character of the property of an estate, the evidence is held sufficient to overcome the presumption of community property created by section 164 of the Civil Code and to sustain the decree that the estate was the separate property of the deceased. (Id.)

See Estates of Deceased Persons, 7, 8.

**COMPENSATION.** See Contracts, 12, 14; Corporations, 5, 6; Counties, 5; Public Officers, 6; Workmen's Compensation Act, 3, 4.

**CONDITIONS.** See Building Restrictions, 1; Municipal Corporations, 4; Vendor and Vendee, 5.

**CONFIDENTIAL RELATIONS.** See Divorce, 9; Public Records, 3, 4.

**CONSENT.** See Divorce, 7; Fixtures, 2.

**CONSIDERATION.** See Sales, 5, 8.

**CONSOLIDATION.** See Municipal Corporations, 1.

**CONSPIRACY.** See Accounting, 2, 4; Alienation of Affections, 2.

## CONSTITUTIONAL LAW.

1. **CONSTRUCTION OF FOURTEENTH AMENDMENT OF UNITED STATES CONSTITUTION—MEANING OF WORD "PERSON."**—The word "person" as used in the fourteenth amendment to the constitution of the United States, providing "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," includes aliens, and the provisions are universal in their application to all persons within the territorial jurisdiction, without any regard to any difference of race, of color, or of nationality. (In re Kotta, 27.)
2. **TAXATION—UNEQUAL BURDENS.**—Tax laws that avowedly lay a different and higher burden upon a portion only of all those similarly situated, that is, all those among whom no difference which bears a reasonable and just relation to the matter exists, exempting the remaining portion from the burden, are not "equal laws," and their enforcement would deprive the persons so burdened of the equal protection of the laws guaranteed by the federal constitution. (Id.)
3. **EQUAL PROTECTION OF LAWS—IMPROPER CLASSIFICATION.**—In view of section 1 of the fourteenth amendment of the United States constitution, relative to equal protection of the laws, the classification of the inhabitants of a state, for the purpose of laying a poll tax, into aliens and citizens, the former, but not the latter, being taxed, is not a proper classification, and is forbidden by that section. (Id.)
4. **DEFINITION OF "SYSTEM."**—The word "system," as employed in the constitution, means an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete, harmonious whole,



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**CONSTITUTIONAL LAW** (Continued).

and it necessarily imports both a unity of purpose and entirety of operation. (Coulter v. Pool, 181.)

See Counties, 1-6; Courts, 1, 2; Criminal Law, 16, 19-22, 25; Estates of Deceased Persons, 15; Municipal Corporations, 4; Negligence, 24; Occupational Tax, 3; Public Officers, 6, 7; Superior Court, 4, 5; Taxation, 1, 2; United States Government, 2; Waters and Water Rights, 4; Workmen's Compensation Act, 7, 10, 11.

**CONSTRUCTION.** See Bonds, 6; Contracts, 9; Deeds, 14, 15; Findings, 5; Wills, 7, 8.

**CONTEMPT.**

1. **CONTEMPT OF COURT—SERVICE OF COPY OF ORDER.**—An order adjudging a person in contempt of court made on a hearing wherein such person was regularly cited and duly appeared is not rendered invalid or void by the fact that no copy of the order was served on such person. (In re Kandarian, 479.)
2. **STATUS OF PARTY.**—A party to an action cannot with right or reason ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to its legal orders and process. (Weeks v. Superior Court, 620.)

See Divorce, 1.

**CONTINUANCES.** See Appeal, 25; Trial, 1.

**CONTRACTS.**

1. **OPTION—ACCEPTANCE—ELECTION.**—An option contract may be regarded as embodying an offer, and when the optionee, or person to whom the offer is made, signifies his desire to accept in accordance with the terms of the option, the optionor, or person making the offer, becomes obligated to perform. This acceptance of the offer contained in the option contract is called "election" and gives rise to a subsequent contract between the parties to buy or sell, or perform whatever other acts have been specified in the option contract. The particular act or acts which constitute an election may be fixed by the terms of the option, as also the time when, the place where, and the person to whom it shall be made; and the language of the contract itself controls as to what act or acts constitute an election. (Flickinger v. Heck, 111.)
2. **SALE OF STOCK — OPTION—ELECTION.**—Where an option clause in a contract for the sale of stock provided that the first parties would at the option of the second party, at the expiration of a certain time, repurchase from the second party the stock sold for the amount of the purchase price on the exercise of said option,

CONTRACTS (Continued).

provided the second party should give ten days' notice before expiration of the time of his intention to exercise said option, the giving of the notice gave rise to a binding bilateral contract for the repurchase of the stock. (Id.)

3. DEMAND—TENDER.—Under such a contract all that was required of the second party, after due notice of election, was to offer to perform, by tender and demand, on or within a reasonable time after the date upon which the first parties' obligation to perform arose. (Id.)

4. TIME FOR DEMAND.—The general rule is that where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made, and that, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations will be deemed reasonable. (Id.)

5. STATUTE OF LIMITATIONS.—Under such a contract a cause of action arose against the first parties upon their refusal to accept a tender and comply with a demand of the second party, and where the action was brought in less than four years thereafter, it is not barred by subdivision 1 of section 337 of the Code of Civil Procedure. (Id.)

6. STORAGE OF SUGAR—IMPLIED TERMS.—Where the owner of warehouses entered into a contract with the owner of certain sugar by correspondence in which the former solicited the patronage of the latter and represented that he would be in a position to store a certain quantity of sugar, and probably more, and represented that his warehouse was a reinforced concrete, fireproof building, upon which representation a certain quantity of sugar was stored, and thereafter through further negotiations between the parties additional sugar was shipped for storage, there was, in the absence of notice to the consignor to the contrary, at least an implied agreement on the part of the warehouseman to accept the additional amount for storage under the same terms and conditions as the previous amount. (Holly Sugar Corp. v. Leonardt, 134.)

7. DILIGENCE IN RECEIVING GOODS FOR STORAGE—LACK OF LIABILITY FOR DAMAGE BY FIRE.—Where an owner of warehouses, under a contract to store certain sugar, exercises reasonable diligence in prosecuting the work of storing the sugar which is shipped to him in unexpectedly large quantities, and in the process of transferring it from cars to the warehouses places it on an unloading platform which he incloses to protect it from the elements, he is not liable for destruction of the sugar by accidental fire while so temporarily stored, it being reasonably necessary to place the

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CONTRACTS (Continued).

- sugar on the unloading platform temporarily owing to the congested condition of the warehouses and it being left there no longer than, in the exercise of reasonable care and diligence, was necessary. (Id.)
- 8. AGREEMENT TO SELL LAND—PRINCIPAL AND AGENT—VENDOR AND VENDEE—INTENT.—Whether an agreement permitting a person “to sell” land on certain terms creates the relation of principal and agent or that of vendor and purchaser under a contract of sale depends upon the intention of the parties. (Smith v. Blodget, 235.)
- 9. AMBIGUITY—CONSTRUCTION BY PARTIES.—Where the intention of the parties to a contract is imperfectly expressed and the language employed by them is ambiguous and requires interpretation, it is permissible for the court to take into consideration the construction placed upon the instrument by the various persons concerned. (Id.)
- 10. ACTION FOR ACCOUNTING—SALE OF LAND UNDER OPTION—FAILURE TO SIGN OPTION.—In an action for an accounting to recover from defendants profits derived from a sale of land effected by them, without the knowledge and consent of plaintiffs, by means of an option given to the plaintiffs by the land owners, the failure of the trustee for the owners to sign the option is of no avail to the defendants, where the sale was consummated by them under the option and its terms were observed and complied with without question by all of the owners of the land. (Id.)
- 11. DAMAGES—EVIDENCE—COST OF REMOVAL OF DESTROYED BUILDINGS.—In an action by a licensee to recover damages for the destruction of a dwelling and a windmill erected by him on land of defendants, where the agreement under which the buildings were erected required the plaintiff to remove the structures to his own land and the plaintiff sought to establish value merely by proof of the cost of construction, it was error to refuse defendants permission to prove the cost of removal in mitigation of the damage. (Gosliner v. Briones, 557.)
- 12. SERVICES FOR MANAGEMENT OF RANCH—COMPENSATION CONTINGENT ON PROFITS—RENDITION OF YEARLY ACCOUNTS—WAIVER.—Where a contract relating to the management of a ranch required the manager to keep proper books of account and to render an account annually, and provided for the payment of all expenses of operation before the payment of any compensation to the manager, and owing to the fact that the profits of the ranch were not in the form of cash, there was insufficient money to pay the manager at the end of the first and second years, and as a result payment of compensation was not asked, but the parties continued under the contract until the sale of the property, the right to a yearly

**CONTRACTS (Continued).**

settlement of accounts was waived by both parties, and the manager was entitled to full compensation upon proof of a profit each year equal to or in excess of the compensation. (*Shields v. Rancho Buena Ventura*, 569.)

13. **ACTION FOR SERVICES—EVIDENCE—BOOK ACCOUNTS.**—In an action upon claims alleged to have arisen in connection with the management of a ranch for a corporation, the corporation's books were admissible as containing the first permanent entries of the transactions in question, where the correctness of the books were attested by the secretary who made the entries and by the manager who furnished the original data from which the entries were made. (*Id.*)
14. **PROFITS OF RANCH—INCREASE IN STOCK AND PRODUCE—CONSTRUCTION OF CONTRACT.**—Under a contract providing for the payment of all expenses of operation of a ranch before the payment of any compensation to the manager, the increased value of stock or produce on hand at the end of a given year over the value of stock or produce on hand at the end of the preceding year is to be treated as profits. (*Id.*)
15. **MUTUAL MISTAKE—RELIEF—PLEADING AND EVIDENCE.**—A defendant may plead and prove a mutual mistake in the making of a contract which is sought to be enforced against him and be entitled to relief therefrom without asking for a reformation of the contract or having the same reformed. (*California Packing Corp. v. Larsen*, 610.)
16. **SUFFICIENCY OF EVIDENCE—QUESTION FOR TRIAL COURT.**—The sufficiency of the evidence to justify the reformation of a contract on the ground of mistake is a question for the trial court. (*Id.*)
17. **WRITTEN CONTRACT FOR SALE OF FRUIT CROP—MUTUAL MISTAKE—AMOUNT SOLD—SUFFICIENCY OF EVIDENCE.**—In this action for damages for the alleged breach of a written contract for the sale and delivery of one-half of the fruit crop, the finding that there was a mutual mistake in the minds of the parties as to the terms and scope of the contract is held sufficiently supported by the evidence. (*Id.*)
18. **BENEFIT OF THIRD PERSON—ACCEPTANCE.**—While it is true that suit may be brought by the third person upon a contract entered into for its benefit immediately upon the execution of the contract, the rule arises from the fact that the suit itself is deemed an acceptance of the contract, but the true rule is that until such acceptance, there is no liability on the part of the person making the contract, but such contract, as far as the third person is concerned, amounts to a mere offer. (*More v. Hutchinson*, 623.)

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CONTRACTS (Continued).

19. **VOID CONTRACT.**—A void contract, a contract against public policy or against the mandate of a statute may not be made the foundation of any action, either in law or in equity. (*Morey v. Paladini*, 727.)
20. **ILLEGALITY OF INQUIRY BY COURT.**—When the court discovers a fact which indicates that a contract is illegal and ought not to be enforced, it will of its own motion, instigate an inquiry in relation thereto. (*Id.*)
21. **MONOPOLY—DELIVERY OF LOBSTERS FROM MEXICAN WATERS—EXCLUSIVE RIGHT OF SALE.**—A contract to deliver lobsters in this state from Mexican waters during the season when under the fish and game laws of this state no lobsters may be taken in California waters, and giving the purchaser the exclusive right of sale of such lobsters in this state north of parallel 36 degrees north latitude, is illegal as being in violation of the Sherman anti-trust law and section 1673 of the Civil Code. (*Id.*)
22. **INVALIDITY OF AGREEMENT—DEPRIVATION OF ADVANTAGES OF FREE COMPETITION.**—An agreement which has some direct and immediate effect upon interstate commerce is within the inhibition of the Sherman Anti-Trust Act, and it is not essential that the result of the contract should be a complete monopoly in order to vitiate the agreement, but it is sufficient if it really tends to that end and deprives the public of the advantages which flow from free competition. (*Id.*)
23. **PARTIAL RESTRAINT OF TRADE—CONSTRUCTION OF CODE.**—Section 1673 of the Civil Code makes no exception in favor of contracts only in partial restraint of trade. (*Id.*)
24. **CONTRACT IN RESTRAINT OF TRADE—EVIDENCE — INTENTION OF PARTIES.**—In an action to recover damages for breach of a contract for the delivery in this state of lobsters from Mexican waters during the closed season, evidence of the intention of the parties as to the exclusive control and monopoly of the trade by the purchaser was admissible to show that the contract was one in restraint of trade. (*Id.*)
25. **SALE OF SECOND-HAND FURNITURE—DEFAULT OF SELLER—LIQUIDATED DAMAGES—PROVISION NOT ENFORCEABLE.**—A provision in a contract for the sale of the furniture and furnishings of a hotel that in the case the seller failed to deliver the furniture he was to pay the sum of five hundred dollars as a forfeit is not enforceable, notwithstanding the purchaser was an auctioneer and dealer in second-hand goods and bought the furniture for resale. (*Stark v. Shemada*, 785.)
26. **SECOND-HAND FURNITURE—MARKET VALUE.**—It is a matter of common knowledge that second-hand household and hotel furnishings are a commodity of extensive barter and sale, with a market

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**CONTRACTS (Continued).**

value, according to their condition and quality, readily ascertainable. (Id.)

27. **LIQUIDATED DAMAGES—STIPULATION OF PARTIES—ENFORCEMENT.**—Even where the parties to a contract for liquidated damages have by written stipulation agreed that it would be impracticable and extremely difficult to fix the actual damages, if the facts do not support such stipulation, it cannot be enforced. (Id.)

See Account Stated, 1; Appeal, 14; Bailments, 1, 2; Bonds, 2; Building Restrictions, 1, 3; Corporations, 5; Estates of Deceased Persons, 5; Fixtures, 1; Sales, 1-3, 5, 6, 8, 9; Slander, 1; Vendor and Vendee, 1, 3, 5, 6, 8, 9, 11-13.

**CONTRIBUTION.** See Corporations, 3.

**CONVERSION.** See Common Carriers, 1, 4, 5; Landlord and Tenant, 2.

**CORPORATIONS.**

1. **DISREGARD OF ENTITY—FRAUD.**—While it is the general rule that a corporation is an entity separate and distinct from its stockholders, it is also equally well-settled that both law and equity will, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, disregard such distinct existence, and treat them as identical. (*Erkenbrecher v. Grant*, 7.)
2. **ESSENTIALS.**—In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it merely an instrumentality, conduit, or adjunct of its stockholders, but it must further appear that they are the business conduits and *alter ego* of one another, and that to recognize their separate entities would aid the consummation of a wrong. (Id.)
3. **PURCHASE OF NOTES—GUARANTOR AS SOLE STOCKHOLDER—NON-PAYMENT—CONTRIBUTION—STATUTE OF LIMITATIONS.**—Where a corporation purchased notes with money advanced by one of the guarantors, the fact that the guarantor was the sole stockholder of the corporation and had transferred to it all of his property did not, on the theory that the corporation and guarantor were identical and not separate entities, make such purchase a payment of the notes by the guarantor and forthwith set in motion the statute of limitations against any claim for contribution from the co-guarantors, in the absence of any showing of fraud in either the organization of the corporation, the transfer of the property or the purchase of the notes. (Id.)

## CORPORATIONS (Continued).

4. "EXCESS STOCK"—PURCHASE BY CORPORATION.—Where in the articles of incorporation of a corporation formed by employees of one of the navy yards for the purpose of acquiring and operating a ferry in the interest of said employees, it is provided, among other things, that the sale and issuance of stock is with the object of keeping it, so far as permitted by law, in the hands of such employees and that the stock shall be sold upon the condition that the corporation may at any time call in each share of stock held by a stockholder in excess of ten shares by paying therefor the par value with interest at a certain rate, but there is nothing to distinguish the "excess stock" from other stock, this stock is not mere evidence of an indebtedness, or its holders simply creditors of the corporation, and the corporation cannot be compelled, when it has finished its work and is about to dissolve, to repurchase the so-called "excess stock," no reason appearing, appertaining to the conduct of the affairs of the corporation as a going concern, for the purchase of such stock. (*Millott v. Assn. of Mare Island Emp.*, 162.)
5. SALARY OF MANAGER—DISQUALIFICATION OF DIRECTOR—ESTOPPEL.—A corporation which has received the benefit of the services of its general manager is estopped from asserting that one of its directors who voted for a resolution providing for an increased salary was not qualified to act as director. (*Hygienic Health Food Co. v. Grant*, 431.)
6. RIGHT TO INCREASED SALARY—EFFECT OF RESOLUTION.—Where a resolution fixing the salary of the general manager of a corporation was limited in its operation to a period of six months, and thereafter the manager was paid an increased salary for a period of one year, the corporation cannot recover the amount of the increase, where more than three months after the expiration of the six-months period succeeding the passage of a resolution raising the salary the board of directors unanimously passed a resolution declaring that all payments made were fully authorized and that the same salary be continued the remainder of the year. (*Id.*)
7. DISREGARD OF ENTITY.—Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and *vice versa*, it must be made to appear that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased, and that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice. (*Minifie v. Rowley*, 481.)



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CORPORATIONS (Continued).

8. **PROMISSORY NOTE OF CORPORATION—LIABILITY OF INDIVIDUAL—IDENTITY OF PARTIES.**—An individual is personally liable on a corporation note given in renewal of his individual notes, where such corporation is but the double or "*alter ego*" of the individual and no dealings exist between the debtor and the corporation as distinct from the individual. (Id.)
9. **ASSUMPTION OF INDEBTEDNESS—STOCKHOLDER'S LIABILITY—STATUTE OF LIMITATIONS.**—Where one corporation takes over the assets of another corporation with an agreement to assume the liabilities of the latter, the obligation of the stockholders of the former to the latter corporation is barred in three years from the date of the agreement. (*More v. Hutchinson*, 623.)
10. **LIABILITY TO CREDITOR—IGNORANCE OF ASSUMPTION—TIME OF ACCRUAL.**—Where a corporation took over the assets of another corporation with an agreement to assume the liabilities of the latter, among which was a promissory note, and several months thereafter the former corporation executed a new note to the creditor, who had no previous knowledge or information of the assumption of such liability and never assented thereto, the liability of the stockholders of the assuming corporation on the note accrued at the time of the execution of the note and not at the time of the assumption of the liability. (Id.)
11. **RENEWAL OF NOTE—NONEXTENSION OF STOCKHOLDERS' LIABILITY—INAPPLICABILITY OF RULE.**—While it is true that where a note is given by a corporation in renewal of an existing indebtedness of its own the liability of stockholders cannot be extended by such renewal, such rule is inapplicable to a note given by the corporation in renewal of the note of another corporation whose payment it assumed. (Id.)
12. **WRONGFUL ACTS OF AGENTS—IMPUTED NOTICE—APPLICABILITY OF RULE TO OFFICERS.**—While a corporation is bound by the unlawful or fraudulent acts of its agents within the scope of their employment and notice of such wrongful acts is imputed to the corporation, the rule does not extend to the imputing of such notice to an officer of the corporation without actual notice or connection with the transaction, and in matters affecting his private and independent dealings with the corporation. (*Pitman v. Walker*, 667.)
13. **SALE OF STOCK—UNDISCLOSED REPRESENTATIONS OF AGENT—INAPPLICABILITY OF RULE.**—The doctrine of imputed notice of the unlawful and fraudulent acts of the agents of a corporation cannot be fairly applied to a director of a business corporation with relation to undisclosed representations of an agent of the corporation in the sale of its stock. (Id.)

See Contracts, 13; Findings, 2; Taxation, 2, 4.

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**COUNTIES.**

1. **UNIFORM SYSTEM OF COUNTY GOVERNMENTS—CONSTITUTIONAL LAW.**  
The constitution contemplates and commands that the system of county governments shall be uniform throughout the state, except in those special instances where the constitution itself sanctions a departure from uniformity, such, for instance, as in the case of counties or consolidated cities and counties which adopt charters in accordance with the provisions of sections 7½ and 7½a of the constitution. (Coulter v. Pool, 181.)
2. **COUNTY ENGINEER ACT—UNCONSTITUTIONALITY OF.**—Inasmuch as the County Engineer Act provides for a county office, involving the exercise of political functions, it violates the constitutional requirement that the system of county governments prescribed by the legislature shall be uniform throughout the state, by reason of the fact that it is not mandatory in its operations, but it is optional with each county whether or not the office provided for by the act shall be established therein. (Id.)
3. **CHARTER—CONSTITUTIONAL LAW.**—While a county charter should be consistent with the constitution, the whole charter cannot be declared null and void because it may contain certain provisions that are inconsistent with the constitution at the time of its adoption. (Jones v. De Shields, 331.)
4. **CHARTER OF COUNTY OF TEHAMA—FAILURE TO PROVIDE FOR DEPUTY COUNTY CLERKS—VALIDITY.**—The charter of the county of Tehama adopted pursuant to section 7½ of article XI of the constitution is not totally invalid because it contains no provisions for the fixing and regulation, by the board of supervisors, of the manner of appointment and removal, the number, or the compensation of deputy county clerks, as required by such section of the constitution. (Id.)
5. **APPOINTMENT AND COMPENSATION OF DEPUTY COUNTY CLERK—APPLICABILITY OF GENERAL LAW.**—In view of the provisions of section 7½ of article XI of the constitution, relating to county charters superseding general laws as to matters provided for in such charters, the general law contained in section 4266 of the Political Code empowering the county clerk to appoint his own deputy and fixing the compensation for such deputy is applicable to the county of Tehama and has not been superseded by the county charter, which contains no valid provision for either the appointment or compensation of such deputy. (Id.)
6. **COMPENSATION OF SHERIFF AND DEPUTIES—CHARTER OF TEHAMA COUNTY—CONSTITUTIONAL LAW.**—The provision of the charter of the county of Tehama (Stats. 1917, p. 1883) that the salary of the sheriff as sheriff and coroner shall be two thousand four hundred dollars per annum, and he may be allowed deputies not to exceed one thousand three hundred dollars per annum, is not vio-

**COUNTIES (Continued).**

lative of section 7½ of article XI of the constitution, since the provision with reference to the salary of deputies is a part of the provision fixing the compensation of the sheriff, as authorized by subdivision 2 of the section. (*Martin v. De Shields*, 340.)

7. **FORMATION OF NEW COUNTY—PETITION—COMPLIANCE WITH ACTS OF 1907 AND 1909.**—A petition for the organization of a new county out of territory wholly within the territory of an existing county which fails to comply with the requirements of the act of 1907, providing for the formation of new counties (*Stats.* 1907, p. 275), and also with the requirements of the amendatory act of 1909 (*Stats.* 1909, p. 194), is insufficient and properly denied. (*Elder v. Doss*, 415.)

**COUNTY CLERK.** See *Counties*, 5.

**COUNTY ENGINEER ACT.** See *Counties*, 2; *Public Officers*, 1, 6.

**COURTS.**

1. **ACTIONS CONCERNING POSSESSION OF REAL ESTATE—JURISDICTION—CONSTITUTIONAL LAW.**—Where the constitution itself has expressly defined and fixed the exclusive jurisdiction of its courts with reference to actions concerning the possession of real estate, the legislature cannot, under the general power to legislate, infringe upon the jurisdictional limits established by the constitution itself, by giving jurisdiction to superior courts of counties other than those in which the property is located. (*State v. Royal Consolidated Min. Co.*, 343.)
2. **TAXATION—RECOVERY OF POSSESSION OF REAL PROPERTY—JURISDICTION—SECTION 3773, POLITICAL CODE, UNCONSTITUTIONAL.**—Section 3773 of the Political Code, in so far as it attempts to give jurisdiction to the superior court of Sacramento County of actions by the state controller for the possession of real property located in other counties which has been conveyed to the state for delinquent taxes, is void, in view of section 5 of article VI of the constitution, which gives exclusive jurisdiction of actions to quiet title or for the possession of real property to the superior court of the county in which the property is situated. (*Id.*)

See *Appeal*, 13; *Real Estate Brokers' Act*, 2; *Superior Court*; *Waters and Water Rights*, 4; *Workmen's Compensation Act*, 11.

**COVENANTS.** See *Deeds*, 7, 9-11, 15, 16.

**CRIMINAL LAW.**

1. **MOTION IN ARREST OF JUDGMENT—DEFINITION.**—A motion in arrest of judgment is an application on the part of the defendant that

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**CRIMINAL LAW (Continued).**

no judgment be rendered on a plea or verdict of guilty, and, it may be founded on any of the defects in the indictment or information mentioned in section 1004 of the Penal Code, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced. (People v. Lauman, 214.)

2. **DEMURRER TO INDICTMENT—GROUNDS OF.**—The defendant may demur to an indictment when it appears upon the face thereof either that it does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code, or that the facts stated do not constitute a public offense. (Id.)
3. **FORM OF INDICTMENT.**—An indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and it must be direct and certain, as regards the offense charged and the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. (Id.)
4. **OBJECTIONS TO INDICTMENT—HOW TAKEN.**—When the objections mentioned in section 1004 of the Penal Code appear on the face of an indictment, they can only be taken by demurrer, except that the objection that the facts stated do not constitute a public offense may be taken after the trial, in arrest of judgment. (Id.)
5. **SUFFICIENCY OF INDICTMENT.**—In a prosecution for presenting a false proof in support of a claim upon a policy of insurance, under section 549 of the Penal Code, where the indictment alleged that the insurance company was organized and doing an insurance business on a certain date, that defendant procured a policy of insurance, and that, intending to cheat the said company, he presented false claims of proof of loss to it, the proof of loss being set out in the indictment, the indictment was sufficient although there was no allegation, in terms, that the proofs of loss were presented on contracts of insurance for the payment of a loss, and there was no allegation that the company whose existence was alleged issued the policies. (Id.)
6. **JUDGMENTS—OMISSIONS—WHEN NOT PREJUDICIAL.**—Under section 960 of the Penal Code no indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits; and under section 1404, neither a departure from the form or mode prescribed by the Penal Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant or tended to his prejudice, in respect to a substantial right. (Id.)

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CRIMINAL LAW (Continued).

7. **FAILURE TO ALLEGE CONTRACT IN FORCE—IMMATERIALITY OF.**—In such a case the indictment is not defective in not alleging that the contract of insurance was in force at the time the proof of loss was presented. (Id.)
8. **LEWD AND LASCIVIOUS ACT—SUFFICIENCY OF EVIDENCE.**—On this appeal from the judgment of conviction of violation of section 288 of the Penal Code, the testimony of the complaining witness is held not to be so inherently improbable as to be unworthy of belief, although it reveals an exceptional depth of moral degeneracy. (People v. Troutman, 313.)
9. **CONSTRUCTION OF SECTION 288, PENAL CODE—ERRONEOUS REFERENCE.**—The reference to "Part Two" in section 288 of the Penal Code, making it an offense to commit any lewd or lascivious act "other than the acts constituting other crimes provided for in Part Two of this code," should be construed as a reference to "Part One," as the reference was neither a legislative oversight or a clerical misprision. (Id.)
10. **COMPLAINING WITNESS—ACCOMPLICE.**—In a prosecution for violation of section 288 of the Penal Code, the complaining witness cannot be an accomplice regardless of his mental capacity, moral insight, or acquiescence, where the defendant is over the age of fourteen years, since the gist of the offense is the crime against a child under the age of fourteen years. (Id.)
11. **EVIDENCE—TESTIMONY OF COMPLAINING WITNESS—CORROBORATION.** In a prosecution for violation of section 288 of the Penal Code corroboration of the testimony of the complaining witness is not required. (Id.)
12. **ACTS COMMITTED AFTER AGE OF FOURTEEN YEARS—CORROBORATION.** In a prosecution for violation of section 288 of the Penal Code corroboration is not required of the testimony of the complaining witness relating to the commission of similar acts by the defendant subsequent to the act charged and after the witness became of the age of fourteen years, admitted to show the disposition of the defendant to commit the act charged. (Id.)
13. **LETTERS OF DEFENDANT—CONSTRUCTION—INSTRUCTION.**—In a prosecution for violation of section 288 of the Penal Code the defendant was not entitled to an instruction that the jury were to give an innocent construction to letters written by defendant to the complaining witness because the mother of the witness gave them such a construction when they were received and before she was informed of the alleged acts. (Id.)
14. **OTHER OFFENSES—EFFECT OF PROOF—INSTRUCTION.**—An instruction that testimony had been introduced tending to prove other lewd acts for the purpose of proving the lewd and lascivious disposition of the defendant, and not to prove distinct offenses, but

## CRIMINAL LAW (Continued).

such evidence was corroborative evidence tending to support the offense charged, was not erroneous. (Id.)

15. JURY — EXERCISE OF PEREMPTORY CHALLENGES — DEPARTURE FROM CODE PROCEDURE—LACK OF PREJUDICE.—A defendant cannot complain of an alleged violation of section 1088 of the Penal Code, which provides that first the people and then the defendant shall take a peremptory challenge, by the action of the court in permitting the district attorney to exercise one peremptory challenge after passing his challenge several times, where the defendant after exercising nine of his peremptory challenges, leaving one unexercised, and the state exercising only the one challenge, expressed satisfaction with the jury. (Id.)
16. SYNDICALISM ACT—INCLUSION OF ACCOMPLICES—LACK OF UNCERTAINTY.—The Criminal Syndicalism Act (Stats. 1919, p. 281) is not void for uncertainty because it *ex industria* includes accomplices and defines with meticulous care numerous acts constituting an aiding and abetting of the principal crime, or because it punishes aiders and abettors where the crime advocated is not committed. (People v. Steelik, 361.)
17. INDICTMENT—CHARGE OF SEVERAL OFFENSES—EVIDENCE—PROOF OF SPECIFIC OFFENSE—VALIDITY OF JUDGMENT.—An indictment for the crime of criminal syndicalism is sufficient to support the judgment of conviction, notwithstanding it charges in general terms acts and offenses not proven, where it specifically charges the offense proven, and no other offense or acts were proven or offered to be proven. (Id.)
18. MEMBERSHIP IN INDUSTRIAL WORKERS OF WORLD—SUFFICIENCY OF INDICTMENT.—An indictment charging a defendant with being a member of an organization known and designated as the Industrial Workers of the World sufficiently charges an offense under subdivision 4 of section 2 of the Criminal Syndicalism Act of 1919. (Id.)
19. ACTS DENOUNCED BY STATUTE — CONSTITUTIONAL LAW.—The Criminal Syndicalism Act is not unconstitutional on the ground that it leaves to a court or jury the determination of whether or not the particular act or conduct of the defendant is adapted to the result denounced by the act, since the various acts mentioned in the statute are already denounced as wrongful under existing laws. (Id.)
20. GUARANTY OF FREE SPEECH—RIGHT NOT VIOLATED.—The Criminal Syndicalism does not violate the right of free speech guaranteed in the federal and state constitutions. (Id.)
21. RIGHT TO ATTACK CONSTITUTIONALITY OF ACT.—A defendant not charged with or convicted of a violation of the Criminal Syndicalism Act involving anything that he said or published is not

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**CRIMINAL LAW (Continued).**

in a position to attack the constitutionality of the act on the ground that it is violative of the right of free speech. (Id.)

**22. TREASON PROVISIONS OF CONSTITUTIONS—ACTS INIMICAL TO PUBLIC WELFARE—PUNISHMENT NOT PROHIBITED.**—The definitions of treason contained in the federal and state constitutions are merely for the purpose of limiting the number of offenses which can be punishable as treason under the common law, and in no wise limits the power of the legislature to provide for the punishment of acts inimical to the public welfare which theretofore might have been punished as constructive treason. (Id.)

**23. MEMBERSHIP OF UNLAWFUL ORGANIZATION—EVIDENCE—CONDUCT OF MEMBERS PRIOR AND SUBSEQUENT TO ENACTMENT.**—In a prosecution under the Criminal Syndicalism Act for being a member of an organization which in its nature is a criminal conspiracy to change industrial control and government by unlawful and criminal methods, evidence of the conduct of the members of the organization both before and after the passage of the act is admissible for the purpose of determining the character of the organization, where such organization after the passage of the act continued the publication of the same unlawful propaganda. (Id.)

**24. VIOLATION OF SYNDICALISM ACT—INDICTMENT—SPECIFICATION OF ACTS.**—An indictment charging a defendant with the commission of acts in violation of subdivision 5 of section 2 of the Criminal Syndicalism Act of 1919 (Stats. 1919, p. 281), should contain a specification of such acts. (People v. Taylor, 378.)

**25. MEMBERSHIP OF UNLAWFUL ORGANIZATION—INDICTMENT—FAILURE TO STATE NAME—LACK OF PREJUDICE.**—The failure to name the organization in an indictment charging a defendant with being a member of an organization denounced by subdivision 4 of section 2 of the Criminal Syndicalism Act, is not a sufficient ground for a reversal of the judgment of conviction, in view of article VI, section 4½, of the constitution, where the indictment sufficiently charged the offense in general terms, and the defendant, who acted as his own counsel, was advised by the district attorney at the beginning of the trial as to the particular organization referred to in the indictment. (Id.)

**26. CHARACTER OF ORGANIZATION—EVIDENCE—BOOKS AND PAPERS.**—In a prosecution under an indictment charging a defendant with being a member of an organization denounced by subdivision 4 of section 2 of the Criminal Syndicalism Act, books, pamphlets, and papers advocating criminal syndicalism and sabotage found at the headquarters of the organization are admissible as tending to show the character of the organization. (Id.)

**27. QUESTION FOR JURY.**—In such a prosecution, the question whether or not the particular organization was organized to advocate, teach,



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**CRIMINAL LAW (Continued).**

aid, and abet criminal syndicalism is for the jury to determine, and not for the court to infer as a matter of law. (Id.)

28. **MEMBERSHIP OF UNLAWFUL ORGANIZATION—SUFFICIENCY OF EVIDENCE.**—In this prosecution under an indictment containing four counts based upon subdivisions 1, 2, 4, and 5 of section 2 of the Criminal Syndicalism Act, the evidence is held sufficient to sustain the conviction on the count of knowingly belonging to an organization advocating criminal syndicalism and sabotage, but not sufficient to support the verdict on the other counts. (Id.)
29. **ADVOCACY OF DOCTRINES—INDICTMENT—SPECIFIC ACTS.**—An indictment charging a defendant with advocating the doctrine of criminal syndicalism and with printing or circulating books or pamphlets relating to such doctrine should designate the specific acts, and name and describe the books and pamphlets, and the statement of the offenses in the language of the statute is not sufficient. (Id.)
30. **PRINTING OR CIRCULATION OF LITERATURE — CHARACTER OF — RELATIVE DUTY OF COURT AND JURY.**—In prosecutions for printing or circulating pamphlets, books, or other articles advocating criminal syndicalism, if the articles are in plain and unequivocal terms, it is the duty of the court to construe the meaning and effect of the documents for the benefit of the jury, but if the instruments are susceptible of two interpretations, it is for the jury to say, on proper instructions, whether the documents are unlawful. (Id.)
31. **LIBERALITY OF CONSTRUCTION.**—In determining the sufficiency of a criminal complaint in a justice's court, the greatest liberality of construction must be indulged, and if the complaint states facts which constitute a crime, it will not be held insufficient because other facts are stated which are irrelevant or immaterial or because the law violated by the alleged acts is inaccurately described therein. (In re Culver, 437.)
32. **STATUTES—PLEADING AND EVIDENCE.**—A court takes judicial notice of the statutes of the state, and it is unnecessary that their titles or terms be set forth in a criminal complaint. (Id.)
33. **NATURE OF ACTS CHARGED.**—If the facts stated in a criminal complaint constitute a crime under a particular law, an allegation that they are a violation of another and different law may be disregarded as immaterial. (Id.)
34. **MOTION TO SET ASIDE JUDGMENT.**—Where a judgment of conviction of a criminal offense is entered upon a plea of guilty, the defendant is not entitled to make a motion to set aside the judgment upon any grounds which would have been reviewable upon a motion for a new trial or upon an appeal from the judgment. (People v. Davis, 750.)

**CRIMINAL LAW (Continued).**

35. **ORDER DENYING MOTION—CONFLICT OF EVIDENCE—APPEAL.**—An order denying a motion to set aside a judgment of conviction entered upon a plea of guilty will not be disturbed on appeal where the evidence as to every ground relied upon in support of the motion is in direct and substantial conflict. (Id.)
36. **YOUTH AND IGNORANCE OF DEFENDANT—IMMATERIAL MATTERS.**—On an appeal from an order denying a motion to set aside a judgment of conviction entered upon a plea of guilty, the youth of the defendant and his possible misapprehension of the enormity of the crime and the severity of the penalty cannot be considered. (Id.)
37. **INSANITY BEFORE TRIAL—CONVICTION AND IMPRISONMENT—HABEAS CORPUS.**—A prisoner in a state prison is not entitled to his discharge on *habeas corpus* on the ground that prior to the time he was charged with the crime for which he was sentenced he had been committed to a state hospital as an insane person, and that he had never been lawfully discharged therefrom or formally restored to sanity. (In re Stevenson, 773.)
38. **INSANITY—JURISDICTION—COLLATERAL ATTACK.**—When a person is charged with crime by information or indictment, if the defense of insanity exists, it must be presented to the court having jurisdiction of the cause, and the decision of that court is final against collateral attack. (Id.)
39. **FINAL JUDGMENT—INSANITY—HABEAS CORPUS.**—After a conviction and sentence have become final, the question of insanity of the defendant at the time of trial cannot be raised on *habeas corpus*. (Id.)

See Habeas Corpus, 1.

**CRIMINAL SYNDICALISM ACT.** See Criminal Law, 16–19, 23, 24, 26, 29, 30.

**DAMAGES.** See Contracts, 11, 27; Fixtures, 4; Negligence, 5, 18–20, 26; Sales, 1; Slander, 4; Street Law, 5.

**DEBTOR AND CREDITOR.** See Statute of Limitations, 3.

**DECLARATIONS.** See Alienation of Affections, 2; Evidence, 5.

**DEEDS.**

1. **DELIVERY—EVIDENCE OF.**—The question of delivery of a deed is essentially one of fact and depends upon the intention of the parties to unconditionally transfer the title to the property. No set form of delivery is necessary, and whether a delivery has been effected in a particular case must be determined by the facts and

## DEEDS (Continued).

the circumstances, including the conduct of the parties. (McCully v. McArthur, 194.)

2. ACTION TO CANCEL AND QUIET TITLE—FINDINGS.—In an action for the cancellation of deeds to real property given by plaintiff's testator to the defendant and to quiet title, where the trial court found that on a certain date there was a delivery of the deeds, another finding to the effect that neither the testator nor her estate was the owner of the property at all times is correct, for upon the theory that there was a delivery on the date found, neither the testator nor her estate could have been the owner after that date. (Id.)
3. TRANSFER IN CONTEMPLATION OF DEATH — MOTIVE — EVIDENCE.—Although the complaint alleged in such action that the transfer was made in contemplation of death, where the court found that the deeds were delivered during the lifetime of the grantor and that title was in the grantee, the motive of the former—whether she delivered the deeds in contemplation of death—is immaterial, and the finding could not have been prejudicial. (Id.)
4. EVIDENCE—PHYSICAL CONDITION OF GRANTOR.—In such a case evidence of the statement of the doctor to the grantor concerning her physical condition was properly excluded as hearsay, the doctor not being called as a witness. (Id.)
5. FEAR OF GRANTEE.—In such a case the testimony of a witness as to whether or not the grantor was in fear of the grantee was properly excluded, where there was no claim that the deeds were delivered by reason of the grantee's coercion. (Id.)
6. EQUITY—RELIEF.—In such a case, where the complaint asked for a cancellation of the deeds, and the court found that respondent was the owner of the property, the relief granted was clearly embraced within the issues. (Id.)
7. HUSBAND AND WIFE—GRANT DEED—BREACH OF COVENANT—PLEADING—PARTIES.—Where a husband and wife execute a deed as joint and several obligors, the wife is severally liable and may be sued alone for a breach of covenant for quiet enjoyment. (Platner v. Vincent, 443.)
8. BREACH OF CONTRACT OF SEISIN—VENUE.—An action for damages for breach of a contract of seisin is not an action to try title in the sense that requires the suit to be brought in a court of competent jurisdiction of the state in which the land is situated. (Id.)
9. BREACH OF COVENANT FOR QUIET ENJOYMENT.—In the absence from a deed of a stipulation providing therefor, the question whether an express covenant for quiet enjoyment runs with the land must be determined by the *lex situs* rather than the *lex loci contractus*. (Id.)

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**DEEDS (Continued).**

10. **COVENANT RUNNING WITH LAND—PRESUMPTION AS TO LAW OF ANOTHER STATE.**—In an action for breach of a covenant for quiet enjoyment of land situated in another state, where no statute of such state is pleaded or called to the attention of the court, the presumption is that the law of such state is similar to the law of this state, namely, that such a covenant runs with the land. (Id.)
11. **BREACH OF COVENANT OF QUIET ENJOYMENT—VENUE.**—While a covenant for quiet enjoyment runs with the land, it is interrupted by and ceases upon a breach thereof, and where the breach occurs while the original grantee still holds the interest originally conveyed to him by the grantor, the claim, assuming that it arises from the fact that the broken covenant runs with the land, becomes a chose in action and transitory and enforceable in any jurisdiction in which the grantor may be found. (Id.)
12. **ACTION BY ORIGINAL GRANTEE—VENUE.**—The original grantee under a deed executed in this state to land situated in the state of Washington may recover for breach of covenant for quiet enjoyment, irrespective of whether the covenant runs with the land, notwithstanding the laws of Washington declare such a covenant to be an express covenant and hence for all purposes substantially a part of the deed, since such covenant is one of agreement. (Id.)
13. **ACTION BY ASSIGNEE OF ORIGINAL GRANTEE—VENUE.**—Where an assignee or grantee of the original grantee seeks recovery for a breach of a covenant for quiet enjoyment while he holds the title, a different rule prevails, for in such a case there is no privity of contract between the original grantor and the assignee and the latter's right to enforce the covenant rests upon privity of estate, and, in the absence of a contract providing that the covenant should inure to his benefit, his right for relief for its breach would be dependent upon the covenant running with the land. (Id.)
14. **CONSTRUCTION OF DEED—LAW CONTROLLING.**—The effect and construction to be given a deed must be determined by the laws of the state in which the lands it conveys are located, irrespective of where it may have been executed or the grantors resided. (Id.)
15. **DEED TO LAND IN WASHINGTON—CONSTRUCTION OF COVENANTS.**—Covenants in a deed executed in this state to land situated in the state of Washington must be construed and their scope ascertained from and measured by the laws of such state, and the words "bargain, sell and convey" contained in such a deed constitute an express covenant for quiet enjoyment, and recovery for breach may be had as if expressly inserted therein. (Id.)
16. **INABILITY TO OBTAIN POSSESSION—PARAMOUNT TITLE—BREACH OF COVENANT.**—Failure to obtain possession by reason of a superior

**DEEDS (Continued).**

title in a third person is a breach of a covenant for quiet enjoyment. (Id.)

See Vendor and Vendee, 6, 8.

**DEFAULT.** See Appeal, 25.

**DEFENSE.** See Building Restrictions, 4; Innkeepers, 5; Negligence, 1.

**DELIVERY.** See Deeds, 1, 2.

**DEMAND.** See Contracts, 4.

**DEMURRERS.** See Criminal Law, 2, 4; Pleading, 3.

**DESERT LANDS.** See Waters and Water Rights, 10.

**DISCRETION.**

**QUESTION OF FACT—JUDICIAL DISCRETION.**—The mere condition that some question of fact must be determined before the court may act under a mandatory provision of law does not make the act dependent upon judicial discretion. (Andersen v. Superior Court, 95.)

See Dismissal, 6; Negligence, 19, 27; Waters and Water Rights, 1-3.

**DISMISSAL.**

1. **DISMISSAL OF ACTION—EXPIRATION OF FIVE YEARS.**—The provisions of section 583 of the Code of Civil Procedure are mandatory in the matter of a dismissal of an action after five years except where the parties have stipulated in writing that the time may be extended beyond the five-year limitation. (Rio Vista Min. Co. v. Superior Court, 1.)
2. **EXTENSIONS WITHIN STATUTORY PERIOD.**—Extensions of time made or stipulated to dates for trial within the statutory term of five years provided by section 583 of the Code of Civil Procedure do not operate to prolong such period. (Id.)
3. **TRIAL AFTER EXPIRATION OF FIVE YEARS—JURISDICTION.**—A court is not deprived of jurisdiction to try a case by the mere lapse of five years after answer filed, since it is only after due notice to the plaintiff that the action may be dismissed on motion of the defendant, and until the actual dismissal the matter of going to trial remains subject to the stipulation of the parties. (Id.)
4. **CONDUCT OF COUNSEL—CONSENT TO TRIAL AFTER EXPIRATION OF STATUTORY PERIOD.**—A court was not deprived of jurisdiction

**DISMISSAL (Continued).**

to try a case after the expiration of the five-year period provided in section 583 of the Code of Civil Procedure, although the cause was continued beyond such period by the court on its own motion without the consent of either party, where the long delay in bringing the case to trial was at the repeated request and for the accommodation of the defendants, and the defendants after the expiration of such period requested a continuance and agreed upon a new date of trial before moving for a dismissal of the action. (Id.)

5. **FAILURE TO BRING CASE TO TRIAL IN FIVE YEARS—SECTION 583, CODE OF CIVIL PROCEDURE.**—The requirement of section 583 of the Code of Civil Procedure that an action shall be dismissed by the court in which it is pending on motion of the defendant, after due notice to the plaintiff, or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time be extended, is mandatory. (Andersen v. Superior Court, 95.)
6. **DISCRETION.**—The trial court is without discretion to refuse an order of dismissal where it is made to appear that the action has not been brought to trial within the prescribed period and that no stipulation in writing to extend the time has been made. (Id.)
7. **REMEDIES — MANDAMUS.**—*Mandamus* is a proper proceeding to enforce the provisions of section 583 of the Code of Civil Procedure, providing for the dismissal of an action if not brought to trial within five years after answer filed, where the parties have not stipulated in writing that the time be extended. (Id.)
8. **DEATH OF PARTY — SECTION 353, CODE OF CIVIL PROCEDURE.**—Section 353 of the Code of Civil Procedure, allowing the commencement of an action against the representatives of a deceased person, who dies pending the running of the statute, within a year after the issuing of letters testamentary or of administration on his estate, does not affect the running of the five-year period provided by section 583 of the Code of Civil Procedure after which an action must be dismissed if there is not a stipulation in writing extending the time for trial. (Id.)

See Appeal, 13, 25; Insane Persons, 5.

**DISQUALIFICATION OF JUDGES.** See Superior Court, 3.

**DISTRIBUTION.** See Estates of Deceased Persons, 9, 10, 13.

**DIVORCE.**

1. **CONTEMPT—RIGHT TO FINAL DECREE.**—A party to an action for divorce who has willfully disobeyed a lawful order of the court

**DIVORCE (Continued).**

relating to the custody of the minor child of the marriage is not entitled to have the final decree entered until she has purged herself of the contempt. (*Weeks v. Superior Court*, 620.)

2. **CONSTRUCTION OF CODE.**—Section 132 of the Civil Code, which provides that when one year has expired after the entry of the interlocutory decree the court, on motion of either party, may enter the final judgment granting the divorce, does not mean that a party may have a final decree entered when to do so would be a flagrant abuse of the principles of equity and of the due administration of justice, since it is within the contemplation of the section that facts arising subsequently to the granting of the interlocutory judgment should have their influence in determining the right to a final decree. (*Id.*)
3. **EXTREME CRUELTY—CONFLICT OF EVIDENCE—FINDINGS—APPEAL.**—Where in an action for divorce on the ground of extreme cruelty the evidence is in substantial conflict as to each and all of the alleged acts, the findings, if in themselves sufficient to respond to such issues, will not be disturbed. (*Turner v. Turner*, 632.)
4. **GENERAL FINDING—CONCLUSION OF LAW.**—A general finding in such an action that the defendant has not been guilty of extreme cruelty or any cruelty toward the plaintiff, and has not wrongfully or at all inflicted upon the plaintiff grievous or any bodily injury, or grievous or any mental suffering, is not sufficient to respond to the issues nor to support the judgment, since it is nothing more than a conclusion of law. (*Id.*)
5. **TRUTH AND FALSITY OF MATERIAL ALLEGATIONS—INSUFFICIENCY OF FINDINGS.**—General findings in such an action that each and every material allegation contained in plaintiff's complaint is untrue, and that each and every material allegation contained in defendant's answer is true, are insufficient to support the judgment, since they are uncertain as to what averments are deemed material. (*Id.*)
6. **SPECIFIC AND GENERAL FINDINGS—SUPPORT OF JUDGMENT.**—Where in an action for divorce on the ground of extreme cruelty the court, in addition to general findings, made specific findings as to the truth or falsity of each and all of the particular averments of cruelty set forth in the complaint, and found them to be either untrue or unsustained by sufficient evidence, the generalities in the findings may be disregarded. (*Id.*)
7. **DESERTION—EVIDENCE—SEPARATION BY MUTUAL CONSENT.**—In an action for divorce on the ground of desertion, a finding against the plaintiff is justified on evidence sufficient to justify the conclusion that the separation was by mutual consent. (*Id.*)
8. **EXTREME CRUELTY—UNCERTAINTY OF SPECIFIC FINDING—INSUFFICIENT GROUND OF REVERSAL.**—Where in an action for divorce on



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**DIVORCE (Continued).**

the ground of extreme cruelty the court made general findings that the defendant had not at any time or at all been guilty of extreme cruelty toward the plaintiff, the judgment in favor of the defendant will not be reversed because of uncertainty in a specific finding upon a single charge of cruelty as to whether, by reason of its partly disjunctive and partly conjunctive form, it was in favor of or against the allegation of the complaint. (Id.)

9. EVIDENCE—CAUSE OF MARITAL UNHAPPINESS — STATEMENT TO PHYSICIAN—HEARSAY.—In such an action a statement made by the plaintiff to her physician regarding her husband's treatment of her as affecting the unhappiness of her married life was inadmissible, where not part of the *res gestae* or necessary to enable the physician to determine the nature of her malady. (Id.)

See Account Stated, 4.

**DRAINAGE DISTRICTS.** See Superior Court, 2, 3, 7, 8.

**ELECTION.** See Contracts, 1, 2.

**ELECTIONS.** See Municipal Corporations, 2, 3.

**ELEVATORS.** See Negligence, 24-26, 28.

**EMPLOYER AND EMPLOYEE.** See Parties, 1; Workmen's Compensation Act, 1, 2, 6, 7.

**ESCROW.** See Vendor and Vendee, 12.

**ESTATES OF DECEASED PERSONS.**

1. SUCCESSION—NONRESIDENT ALIEN HEIRS—PETITION FOR DISTRIBUTION—INSUFFICIENT ANSWER.—An answer to a petition for distribution to certain heirs of the estate of a deceased person does not state facts sufficient to show that the petitioners are not entitled to the estate under the provisions of sections 672 and 1404 of the Civil Code, providing that nonresident alien heirs must make their claim within five years after the death of the decedent, where the answer does not aver that the petitioners were not residents and citizens of California, or of the United States, at the time of decedent's death, and ever since, until the time of the filing of the answer, since if they were such residents or citizens at the time of the death of the decedent, they would immediately succeed to the title, free from the condition expressed in section 1404, and no claim on their part would be necessary to enable them to take by succession. (Estate of Aufret, 34.)

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**ESTATES OF DECEASED PERSONS (Continued).**

2. **JUDGMENT AGAINST ADMINISTRATORS—PAYMENT OUT OF ESTATE—**  
As against the administrators and the property of the estate of a deceased person, a judgment recovered is only payable from the assets of the estate in due course of administration, and such judgment is only the equivalent of an allowed and approved claim. (Turner v. Fidelity & Deposit Co., 76.)
3. **JUDGMENT AGAINST ESTATE—EFFECT ON SURETIES.**—In an action upon a bond given to release an attachment the judgment against the administrators of the estate of a deceased principal fixes the liability of the surety so far as the conclusiveness of the judgment on the original claim is concerned, and the plaintiff is under obligation to look no further than to his surety in enforcing collection. (Id.)
4. **ATTORNEY AS EXECUTOR—RIGHT TO EMPLOY COUNSEL.**—An executor or administrator of the estate of a deceased person, who is himself a practicing lawyer, is entitled to employ and pay from the estate an attorney for the performance of the usual and ordinary legal services that are incident to the probate proceeding. (Estate of Graham, 222.)
5. **PROCEEDING FOR ENFORCEMENT OF CONTRACT—NATURE OF JUDGMENT.**  
The proceeding authorized by section 1597 of the Code of Civil Procedure is practically a proceeding in equity terminating in a final judgment having the full force and effect of a final judgment in an action for specific performance of a contract. (Estate of Cheda, 322.)
6. **SUCCESSION—CHILDREN OF DECEASED SISTER—CONSTRUCTION OF CODE.**—The separate property of a widow dying intestate who leaves neither issue, father, mother, brother, nor sister descends to the children of a deceased sister as next of kin under subdivision 5 of section 1386 of the Civil Code, to the exclusion of grandchildren of another deceased sister, since subdivision 3 of such section giving right of representation only applies where the deceased leaves a surviving brother or sister. (Estate of Ross, 454.)
7. **COMMUNITY PROPERTY—VESTING OF INTERESTS OF DECEASED SPOUSES.**—Where a widow dies intestate leaving property which was the community property of herself and her predeceased husband, the interests of the heirs of the deceased spouses vest independently of each other under subdivision 8 of section 1386 of the Civil Code, and the heirs of the predeceased husband are entitled to the one-half without regard to whether the other half vests in a father, mother, brothers, or sisters of the widow. (Id.)
8. **CHILDREN OF DECEASED BROTHERS AND SISTERS—RIGHT OF SUCCESSION TO COMMUNITY PROPERTY—CONSTRUCTION OF CODE.**—Under subdivision 8 of section 1386 of the Civil Code, there need be no brother or sister surviving in order that the descendants of

## ESTATES OF DECEASED PERSONS (Continued).

deceased brothers and sisters may inherit the one-half of the community property of a deceased spouse, who left neither issue nor parents. (Id.)

9. PETITION FOR PARTIAL DISTRIBUTION—OUTSTANDING UNALLOWED CLAIM—SUFFICIENCY OF PETITION.—A petition for partial distribution presented in accordance with the terms of section 1663 of the Code of Civil Procedure, added in 1917, is not insufficient, because it shows an outstanding claim not allowed, where it appears that sufficient property has been set aside to cover it, since it is not a requisite that all claims shall have been allowed or disallowed, but only that the court satisfy itself that no injury can result from distribution. (Id.)
10. DETERMINATION OF HEIRSHIP—COMPLIANCE WITH SECTION 1664, CODE OF CIVIL PROCEDURE.—A petition for partial distribution under section 1663 of the Code of Civil Procedure is not insufficient because of failure to comply with section 1664, relative to the determination of heirship. (Id.)
11. PAYMENT OF INHERITANCE TAXES—SUFFICIENCY OF ORDER.—An order for partial distribution directing that out of the distributed properties there shall be deducted and paid the inheritance taxes due from each of the distributees, sufficiently satisfies the requirements of section 1669 of the Code of Civil Procedure. (Id.)
12. EVIDENCE—PEDIGREE—CONSTRUCTION OF CODE.—The provisions of section 1852 and subdivision 4 of section 1870 of the Code of Civil Procedure do not prescribe the sole method by which pedigree must be proved, and do not exclude testimony on that subject by one having primary knowledge of the facts and who is competent to testify. (Id.)
13. FINDINGS—HEIRSHIP.—In a proceeding for partial distribution, a general finding that all the allegations of the petition are true is controlled by a special finding that certain named persons are the heirs. (Id.)
14. LETTERS OF ADMINISTRATION—RESIDENCE OF APPLICANT—FINDING—APPEAL.—A finding that an applicant for letters of administration was not a *bona fide* resident of the state at the time of his application will not be disturbed on appeal. (Estate of Barnes, 566.)
15. DISQUALIFICATION OF NONRESIDENTS—CONSTITUTIONAL LAW.—The statute denying to nonresident heirs the right to administer upon the property of decedents in this state is not in violation of the fourteenth amendment to the federal constitution, which provides that no state shall deprive any person of life, liberty, or property, nor deny to any person within its jurisdiction the equal protection of the laws. (Id.)

See Appeal, 14; Dismissal, 8; Evidence, 1; Wills, 7.

**ESTOPPEL.** See Bonds, 4; Corporations, 5; Public Lands, 10; Vendor and Vendee, 13; Waters and Water Rights, 11, 12; Workmen's Compensation Act, 9.

## **EVIDENCE.**

1. **DISQUALIFICATION OF WITNESSES—SECTION 1880, SUBDIVISION 3, CODE OF CIVIL PROCEDURE—WAIVER—EXECUTORS AND ADMINISTRATORS.**—The provision of section 1880, subdivision 3, of the Code of Civil Procedure, that parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person, cannot be witnesses, may be waived by the personal representative of the decedent; and in an action by the surviving widow of the deceased to recover from his estate a certain amount which she had turned over to him for investment in bonds, where the administrator expressly declined to object to the widow testifying on the grounds of incompetency under said section, the waiver should have been allowed and the witness permitted to testify. (Kinley v. Largent, 71.)
2. **WITNESSES—REFRESHING MEMORY—MEMORANDUM.**—A witness cannot refresh his memory or testify from a memorandum unless it is made to appear that the memorandum complies with certain qualifications specified in section 2047 of the Code of Civil Procedure. (McEwen v. New York Life Ins. Co., 144.)
3. **FAILURE TO CALL WITNESS—PRESUMPTION.**—In such an action the contention of plaintiff that since defendant objected to plaintiff's questioning the physician who examined the decedent for defendant and itself failed to call the physician, the presumption arises that the physician's testimony would have been adverse to defendant, cannot be maintained, as defendant was under no obligation to call the physician as its own witness or to permit him to testify for plaintiff, especially as the physician was unable to recall the medical examination at all and there was no legally competent memorandum to aid him. (Id.)
4. **CREDIBILITY OF WITNESS.**—It is the exclusive function of the trial court to weigh the evidence and determine the credibility of the witnesses. (McCully v. McArthur, 194.)
5. **SELF-SERVING DECLARATIONS.**—Declarations made by a party in his own interest are commonly inadmissible, but exceptions to the rule exist under circumstances where a failure to assert a claim or right may be construed against the party as an implied negation, or where the assertion of such claim at a later date is attributed to conditions and exigencies which have arisen since the transaction in

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**EVIDENCE (Continued).**

question, which motive would be disproved by showing earlier declarations to the same effect. (*Hotaling v. Hotaling*, 695.)

- 6. CUMULATIVE EVIDENCE—COLLATERAL TRANSACTION.**—The exclusion of evidence which is merely cumulative of an undisputed fact, and which relates to a transaction entirely collateral to the main issue, is not error. (*Id.*)

See Accounting, 4; Alienation of Affections, 1, 2; Appeal, 9, 23, 24; Assignments, 3, 5, 6; Attorney and Client, 1; Building Restrictions, 5; Community Property, 5; Contracts, 11, 13, 17, 24; Criminal Law, 8, 11–13, 23, 26–28, 32; Deeds, 1, 4, 5; Divorce, 3, 7, 9; Estates of Deceased Persons, 12; Gifts, 1, 2; Life Insurance, 3; Marriage, 1; Negligence, 13, 23, 28; Promissory Notes, 1; Public Lands, 7, 11; Residence, 2; Taxation, 4, 5; Waters and Water Rights, 11; Wills, 1.

**EXECUTION SALES.** See Mortgages, 2.

**EXECUTORS AND ADMINISTRATORS.** See Estates of Deceased Persons, 4, 14, 15; Evidence, 1; Partnership, 1, 2; Statute of Limitations, 3.

**EXPOSITIONS.** See Negligence, 14, 15, 17.

**FIDUCIARY RELATIONS.** See Accounting, 3; Statute of Limitations, 3.

**FINDINGS.**

- 1. SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE—ABSENCE OF.**—In the absence of a specification of insufficiency of evidence to sustain a finding, it must be construed as binding and as warranted by the evidence adduced at the trial. (*Los Angeles etc. Land Co. v. Marr*, 126.)
- 2. CORPORATIONS—FORFEITURE OF FRANCHISE—CONVEYANCES.**—In an action to forfeit title to land for breach of building restrictions, where the court found that a corporation predecessor in interest in the right had conveyed the right to sue for forfeiture and also found that this corporation had forfeited its franchise for failure to pay the license tax, the date not being found, however, and that the trustees of the corporation conveyed the right to plaintiff, there is a necessary implication that the conveyance by the corporation was executed before it forfeited its charter, for, where a corporation has failed to pay its license tax and a forfeiture of the charter has been declared, it thereupon ceases to be a corporation, and has no right to dispose of its property. (*Id.*)
- 3. VARIANCE—LACK OF SUPPORT OF JUDGMENT.**—Where the findings of material facts are at variance and irreconcilable, there is no show-

**FINDINGS (Continued).**

ing that the facts found warrant or support the judgment rendered, and a reversal of the judgment is necessary. (Id.)

4. **NEGATION OF ALLEGATION OF COMPLAINT—SUFFICIENCY.**—A finding which is in identical language a negation of the allegation in the complaint is sufficient. (Turner v. Turner, 632.)
5. **CONSTRUCTION OF FINDINGS.**—Findings are to be construed so as to support the judgment. (Id.)
6. **SPECIAL FACTS—CONCLUSION OF LAW.**—Where the special facts upon which a finding rests are declared by the court, the ultimate finding of the court is but a conclusion of law with no better foundation than is given by the facts recited. (Stark v. Shemada, 785.)

See Appeal, 1, 9, 16, 22; Deeds, 2, 3; Divorce, 3-8; Estates of Deceased Persons, 13, 14; Sales, 7, 9; Vendor and Vendee, 7.

**FIRE DEPARTMENT.** See Motor Vehicle Act, 1.

**FIXTURES.**

1. **QUESTION OF FACT—INTENT.**—Whether or not in any case a building is permanently resting upon the soil so as to be deemed affixed to the land within the meaning of section 660 of the Civil Code remains a question of fact to be determined upon the evidence of that case, and, as a general rule, the intent of the parties is a controlling criterion. (Gosliner v. Briones, 557.)
2. **STRUCTURES ERECTED BY LICENSEE—OWNERSHIP.**—Where structures are erected upon land by a person who occupies the land with the permission or license of the owner, but who has no estate in the land, consent on the part of the owner of the land that the structures shall remain the property of the person erecting them will be implied in the absence of any other facts or circumstances tending to show a different intention. (Id.)
3. **DAMAGES FOR DESTRUCTION—PLACE OF TRIAL.**—An action by a licensee to recover damages for the destruction of a dwelling and windmill erected by plaintiff on defendants' land was not improperly brought and tried in the county where two of the defendants resided, which was not the county in which the land was situated, since the action was based upon plaintiff's rights to the buildings as personal property. (Id.)
4. **LIABILITY OF EMPLOYEE OF LAND OWNERS.**—An employee of land owners who joined with them in demolishing buildings with full knowledge that they belonged to and were the personal property of the plaintiff is liable for damages. (Id.)

See Contracts, 11.

**FORFEITURE.** See Building Restrictions, 1, 3, 5; Contracts, 25; Findings, 2.

**FRANCHISES.** See Taxation, 2, 4.

**FRAUD.** See Accounting, 1; Account Stated, 3, 4; Corporations, 1, 2.

**GIFTS.**

1. **RECOVERY OF CORPORATE STOCK—ACTION BY MOTHER AGAINST SON—EVIDENCE—BURDEN OF PROOF.**—In an action by a mother against her son to declare a trust in her favor and have restored to her shares of stock of a corporation claimed by the defendant as a gift from the plaintiff, proof by him that there had been a legal transfer of the shares from his mother to him on the corporate records casts the burden upon her to show, either that the transfer never operated to invest the ownership of the shares in the defendant, or that if the gift was actually made, it was voidable on the ground of fraud or undue influence. (*Hotaling v. Hotaling*, 695.)
2. **CORPORATION STOCK—SUFFICIENCY OF EVIDENCE.**—In this action by a mother to recover from a son shares of stock in the family estate corporation claimed by him as a gift from her, and of which corporation she was the president and the son an officer and director and active in the management of its affairs, the finding that no gift was made by her is held to be sufficiently supported by her denial that she ever knowingly transferred the title, and her testimony that as president she frequently signed papers at the son's request without reading them and without knowledge as to their contents. (*Id.*)
3. **IGNORANCE OF CHARACTER OF STOCK CERTIFICATES—EVIDENCE—DIVIDEND CHECKS.**—Familiarity with dividend checks containing an order for the payment of dividends on stock does not tend to establish familiarity with the stock certificates themselves, and such checks are inadmissible to rebut a statement of ignorance of the physical aspects or contents of the certificates. (*Id.*)
4. **PROVISION FOR FUTURE NEEDS—IMMATERIAL ISSUE.**—In an action between a mother and son involving the issue as to whether the former had made to the latter a gift of shares of stock in a corporation, the question as to whether the son had made subsequent provision for the possible future needs of the mother was immaterial, in the absence of any claim that the same was a condition or consideration for the transfer. (*Id.*)
5. **OWNERSHIP OF STOCK—SELF-SERVING DECLARATIONS.**—In an action between a mother and son involving the ownership of shares of stock in the family estate corporation which the defendant claimed as a gift from her, the cross-examination of the defendant as to whether he had said anything to certain persons connected with the corporation as to his ownership of the stock did not justify a redirect examination that he had informed certain other persons not connected with the corporation of his ownership. (*Id.*)



GUARANTY. See Bonds, 2; Corporations, 3; Slander, 1.

#### GUARDIAN AND WARD

1. APPOINTMENT OF GUARDIANS—JURISDICTION.—The superior court has jurisdiction and power to appoint guardians. (*In re Kandarian*, 479.)
2. VALIDITY OF ORDER.—An order appointing a guardian is valid, except on appeal, notwithstanding the fact that some other person may have been lawfully entitled by letters. (*Id.*)
3. HABEAS CORPUS—REFUSAL TO PAY MONEYS TO GUARDIAN—STATUS OF GUARDIAN—PETITION.—In a petition for a writ of *habeas corpus* to secure release from custody for violation of an order directing the petitioner to turn over to the guardian of the estates of her minor children certain moneys belonging to them, the mere allegation that the person to whom she is directed to pay the moneys is not the legally appointed, qualified, and acting guardian of the minors is a bare conclusion of law. (*Id.*)
4. APPEAL—ORDER APPOINTING GUARDIAN—TIME.—An appeal from an order appointing a guardian taken more than six months after the making of the order is too late. (*Id.*)

#### HABEAS CORPUS.

CRIMINAL COMPLAINT IN JUSTICE'S COURT—DETERMINATION OF INSUFFICIENCY.—In *habeas corpus* proceedings, a court may determine whether or not a complaint in a justice's court in a criminal proceeding states facts sufficient to constitute a public offense. (*In re Culver*, 437.)

See Criminal Law, 37, 39; Guardian and Ward, 3.

HUSBAND AND WIFE. See Alienation of Affections, 1; Community Property, 1, 5-7; Deeds, 7; Wills, 4.

INDEBTEDNESS. See Municipal Corporations, 4.

INDICTMENT. See Criminal Law, 3-7, 17, 24, 25, 29.

#### INHERITANCE TAX.

NONRESIDENT TESTATOR—SITUS OF CHOSSES IN ACTION.—The interest of a nonresident testator in the proceeds of a promissory note, acquired by contract and held in this state, does not constitute "property within this state," under sections 1 and 2 of the Inheritance Tax Act of 1913 (Stats. 1913, p. 1066), and it is not subject to an inheritance tax in view of the rule in this state that the *situs* of choses in action follows the domicile of the owner. (*Chambers v. Mumford*, 228.)

See Appeal, 2; Community Property, 4; Estates of Deceased Persons, 11; Residence, 2.

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**INNKEEPERS.**

1. **GUESTS—DEFINITION.**—A guest of an inn or hotel may be defined as one who receives accommodations or entertainment therein, usually for compensation. (Goldstein v. Healy, 206.)
2. **GUESTS—HOTELS—RIGHT TO INVITE PERSONS TO.**—In the absence of a regulation or agreement to the contrary, a guest of a hotel may, as a matter of right, under such reasonable restrictions and regulations as the manager may impose, invite unobjectionable persons to visit him at the inn for lawful purposes and at proper times. (Id.)
3. **RIGHTS OF INVITEES.**—To all such invitees, the innkeeper owes the duty of at all times maintaining his hotel premises in a reasonably safe condition, and of exercising reasonable care to protect them while in the hotel and in the part thereof open to the public from personal injury through his negligence; but this duty does not obtain in cases where the injury to the invitee was due to a patent defect, or structural insecurity in the hotel premises or its equipment. (Id.)
4. **ACTION FOR DAMAGES—INJURY TO INVITEE OF GUEST OF HOTEL—PLEADINGS—SUFFICIENCY OF COMPLAINT.**—In an action by the invitee of a guest of a hotel for personal injuries received by him, alleged to have been caused by the giving away of a railing on a platform whereby he was precipitated to the ground, an allegation that the decayed condition of the railing was "unknown" to plaintiff was in effect a sufficient declaration that it was latent. (Id.)
5. **FAILURE TO EXERCISE CARE—DEFENSE.**—If the defective condition of the railing in such a case was such that it would have been discovered by plaintiff in the exercise of ordinary care, the failure to exercise such care would be a defense which the plaintiff is not required to anticipate. (Id.)

**INSANE PERSONS.**

1. **COMMITMENTS—PLACE OF HEARING.**—Under section 2185c of the Political Code, providing that when a person accused of being so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control is brought before the superior court, the judge must by order fix such time and place for the hearing and examination in open court as will give a reasonable opportunity for the production and examination of witnesses, the court may in its discretion designate any place other than that fixed in pursuance of section 142 of the Code of Civil Procedure. (In re Liggett, 428.)
2. **LOSS OF POWER OF SELF-CONTROL—INTEMPERATE USE OF NARCOTICS AND STIMULANTS—TRIAL BY JURY.**—A person accused under section 2185c of the Political Code of being so far addicted to the

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**INSANE PERSONS (Continued).**

intemperate use of narcotics or stimulants as to have lost the power of self-control is not entitled to a trial by a jury under section 2174 of such code, since such section applies only to proceedings to adjudge a person insane for commitment as an insane person. (Id.)

3. **SUFFICIENCY OF AFFIDAVIT.**—An affidavit for the arrest of a person under section 2185c of the Political Code, reciting that the accused has been addicted to the excessive use of intoxicating liquors for more than five years last past and has been continuously intoxicated for six months preceding the making of the affidavit, sufficiently shows that the accused is subject to dipsomania or inebriety to bring him within the purview of the statute and to give the court jurisdiction to proceed with the hearing and examination. (Id.)
4. **TRIAL BY JURY—TIME—CONSTRUCTION OF CODE.**—The provision of section 2174 of the Political Code that after the demand for a jury upon an inquisition of insanity, the court must cause a jury to be summoned and to be in attendance at a date stated, not less than five nor more than ten days from the date of the demand for a jury trial, is directory only, and the failure to impanel a jury and try the matter of insanity within ten days from the date of the demand does not deprive the superior court of jurisdiction to proceed thereafter with the matter. (In re Scott, 770.)
5. **AGREEMENT ON VERDICT—CONSTRUCTION OF CODE.**—The provision of section 2174 of the Political Code that the alleged insane person must be discharged unless a verdict that he is insane is found by at least three-fourths of the jury does not mean that he must be discharged if the jury fails to agree, but means that upon such trial a verdict could be returned by three-fourths in number of a jury of twelve in the same manner as in civil cases, and that he cannot be committed as insane unless a verdict of insanity is found and concurred in by at least three-fourths of the jury. (Id.)

**INSANITY.** See Criminal Law, 37-39.

**INSPECTION.** See Public Records, 1-3.

**INSTRUCTIONS.** See Criminal Law, 13, 14; Life Insurance, 2; Negligence, 2-4, 6-12, 22, 23, 25.

**INSURANCE.** See Assignments, 5; Criminal Law, 5, 7; Life Insurance; Title Insurance.

**INSURANCE CARRIERS.** See Workmen's Compensation Act, 9.

**INTENT.** See Boundaries, 2; Contracts, 8, 24; Deeds, 1, 3; Fixtures, 1; Residence, 1, 2; Wills, 8.

**INTEREST.**

**STATE OR MUNICIPALITY.**—As against a state or municipality thereof interest cannot be recovered except under special statutory authorization. (McNutt v. City of Los Angeles, 245.)

See Street Law, 5.

**INTOXICATING LIQUORS.** See Insane Persons, 1, 8.

**ISSUES.** See Deeds, 6.

**JUDGMENTS.** See Appeal, 1, 7, 8, 11, 17; Criminal Law, 1, 4, 6; Estates of Deceased Persons, 2, 3, 5; Mortgages, 1; Negligence, 21; Public Lands, 6, 10, 12, 13; Tax Sales, 1; Wills, 5, 6.

**JUDICIAL NOTICE.** See Negligence, 28.

**JURIES AND JURORS.**

1. **JURY—SPECIAL VENIRE—DISCRETION.**—It is well established that the court has discretion to order a special venire as provided in section 226 of the Code of Civil Procedure, notwithstanding the fact that there are sufficient names in the term trial jury box. (Estate of Wall, 50.)

2. **JURORS.**—An order for a special venire for a jury is erroneous where it directs the sheriff to summon twenty-four good and lawful *men* of the county, as by reason of the amendment of 1917 to section 226 of the Code of Civil Procedure the venire should require the summoning of good and lawful *persons*, but such objection will not be considered on appeal where not specifically pointed out to the trial court. (Id.)

3. **SUMMONING JURY—QUALIFICATION OF SHERIFF.**—A sheriff is not disqualified to summon a jury on the ground that one of the attorneys in the case who was charged with undue influence is also an attorney for a corporation of which the sheriff is a director. (Id.)

See Criminal Law, 15.

**JURISDICTION.** See Accounting, 1; Appeal, 8; Courts, 1; Dismissal, 3, 4; Guardian and Ward, 1; Insane Persons, 3, 4; Real Estate Brokers' Act, 3; Street Law, 1, 4; Superior Court, 2, 7; Workmen's Compensation Act, 5, 6, 8, 9, 11.

**JURY TRIALS.** See Insane Persons, 2, 4, 5.

**LACHES.** See Public Lands, 2, 4; Vendor and Vendee, 15.

**LANDLORD AND TENANT.**

1. **LEASE—RENT PAYABLE IN COTTON—RIGHTS OF LANDLORD.**—An agreement to raise cotton on leased land and deliver to the landlord one-fourth of the crop as rental creates no title in the landlord to such portion, but merely measures in cotton the amount of the rental for which the tenants are liable. (*Imperial Valley L. Co. v. Globe G. & M. Co.*, 352.)
2. **CONVERSION—PLEADING—INSUFFICIENT ALLEGATION OF OWNERSHIP.** In an action by a landlord against a bank for the alleged conversion of certain cotton claimed by the plaintiff as rental for the premises upon which the cotton was grown, the recital in the complaint that the defendant held warehouse receipts for the cotton issued to one of the tenants and delivered to the bank as security for an indebtedness, and that the bank unlawfully sold and appropriated the proceeds of such cotton, was not a sufficient allegation of ownership, nor can it be so construed on appeal to reverse the judgment in favor of the defendant where the recital was directly contrary to the direct and specific allegations of the complaint. (*Id.*)

**LAW OF CASE.**

**MEANING OF.**—The doctrine of the law of the case means simply that the court having once decided the law and the cause having gone back to the lower court for further proceedings in accordance with the law as thus established, and the parties and the lower court having acted in reliance upon that law, the appellate court will not, upon a second appeal, again enter into a consideration of the question, but, if the facts and circumstances are substantially the same, will treat it as settled law, regardless of its accuracy. (*McEwen v. New York Life Ins. Co.*, 144.)

**LEASES.** See Landlord and Tenant, 1.

**LEWD AND LASCIVIOUS ACT.** See Criminal Law, 8, 10, 11.

**LICENSES.** See Occupational Tax, 1-3.

**LIENS.** See Tax Sales, 1.

**LIFE INSURANCE.**

1. **MEDICAL EXAMINATION—ACCIDENTS.**—In a medical examination on an application for life insurance, a question as to what illnesses, diseases, or accidents the applicant has had since childhood calls

**LIFE INSURANCE (Continued).**

for facts in regard to accidents suffered since childhood, as well as illnesses and diseases, and an answer which omits all mention of accidents is, in effect, an answer that no accidents have been sustained. (McEwen v. New York Life Ins. Co., 144.)

2. **FALSE ANSWERS—DIRECTING VERDICT.**—In an action on a life insurance policy where the evidence conclusively shows that the answer to a question concerning "illness, diseases, and accidents" was untrue and, according to the law laid down for the guidance of the trial court, the truth or falsity of the answers was the determining factor and the only question to be submitted to the jury, it was proper for the judge to direct a verdict for defendant upon the theory that a material question had been falsely answered by the decedent. (Id.)

3. **ACCIDENT—INFORMING MEDICAL ADVISER—INCOMPETENT EVIDENCE.** In an action on a life insurance policy, where it is contended in defense that the insured falsely answered a question on his medical examination in failing to report an accident, there is no competent evidence in support of plaintiff's contention that the decedent informed the medical examiner of the accident, where the only evidence tendered was that of the physician, who testified that he had no independent recollection whatsoever of the examination and a memorandum signed by the witness by which it was sought to refresh his memory dated nine years after the examination was not shown to have been written or dictated by the witness or to have been written at a time when it was fresh in the witness' memory or that he knew the fact was correctly stated therein. (Id.)

**LOS ANGELES CHARTER.** See Municipal Corporations, 5-8.

**MANDAMUS.**

**DENIAL BY DISTRICT COURT OF APPEAL—REMEDY IN SUPREME COURT.**—

Where a petition for a writ of mandate is denied by the district court of appeal, the remedy of the petitioner in the supreme court is by way of petition within the sixty days allowed by the constitution for an order vacating the judgment of the district court and directing a rehearing of the case in the supreme court. (Obenchain v. Superior Court, 419.)

See Dismissal, 7; Public Lands, 6, 7, 13; Waters and Water Rights, 8.

**MARRIAGE.**

**EVIDENCE—CONSTRUCTION OF CODE.**—The intent of section 57 of the Civil Code, providing that consent to marriage and a solemnization thereof may be proved under the same general rules of evidence

**MARRIAGE** (Continued).

as facts proved in other cases, was to enable parties to or persons present at the solemnization of a marriage to testify to the facts within their knowledge that such marriage actually took place, and when to such testimony the additional evidence is educed showing that since the marriage the parties have deported themselves as husband and wife, a *prima facie* case has been sufficiently shown. (Budd v. Morgan, 741.)

See Alienation of Affections, 1.

**MINORS.** See Divorce, 1; Workmen's Compensation Act, 3.

**MISCONDUCT.** See Appeal, 18.

**MISREPRESENTATIONS.** See Life Insurance, 2, 3.

**MISTAKE.** See Account Stated, 3; Contracts, 15; Sales, 6, 9, 10; Vendor and Vendee, 3.

**MONOPOLIES.** See Contracts, 21, 24.

**MORTGAGES.**

1. **FORECLOSURE SALE—APPEAL—STAY OF PROCEEDINGS.**—A decree declaring the amount due on a mortgage and providing for its payment within seventy days and, if not paid, that the property be sold in satisfaction of the indebtedness and a judgment entered for the deficiency, if any, is a judgment directing a sale of real property within the meaning of section 945 of the Code of Civil Procedure, and a stay bond on appeal is necessary to stay the sale. (Sing v. Barker, 587.)
2. **APPEAL BY MORTGAGEES—PORTION OF JUDGMENT—SUPERSEDEAS.**—A writ of *supersedeas* will not issue to stay a foreclosure sale because of the mere fact that the mortgagees also took an appeal from the portion of the judgment fixing the amount due on the mortgage, since the determination of the appeal could not reduce the judgment below the amount allowed. (Id.)
3. **ASSIGNMENT OF INTEREST IN ESTATE—SECURITY FOR NOTE.**—An assignment of an interest in the estate of a deceased person as security for the payment of a promissory note is a mortgage under section 2924 of the Civil Code and passes to the assignee of the note without formal assignment under the provisions of section 2936 of such code. (Pitman v. Walker, 667.)
4. **NOTE AND CONTEMPORANEOUS MORTGAGE—PURCHASER WITH NOTICE—DESTRUCTION OF NEGOTIABILITY.**—Mortgage security operates to destroy the negotiability of a promissory note in the hands of a purchaser with notice thereof, if the mortgage is executed con-



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**MORTGAGES (Continued).**

temporarily with the note, as part of the same transaction. (Id.)

5. **NOTE AND SUBSEQUENT MORTGAGE—PURCHASER WITH NOTICE—NEGOTIABILITY.**—Where a promissory note was negotiable as originally executed, but subsequently mortgage security was demanded and given, such note is negotiable in the hands of a subsequent purchaser with notice of the security in so far as the maker is prohibited from setting up the defenses of fraud or failure of consideration, but the holder is bound by all the restrictions which section 726 of the Code of Civil Procedure places upon actions to collect a debt secured by mortgage. (Id.)

See Vendor and Vendee, 1.

**MOTIONS.**

1. **RENEWAL OF MOTION AFTER DENIAL.**—Section 182 of the Code of Civil Procedure does not apply to the renewal of a motion denied for informality of the moving papers or proceedings, or in cases where leave to renew is given; nor does it go to the jurisdiction of the court to entertain a second motion. The penalty provided by section 183 of the Code of Civil Procedure is punishment for contempt and authority to the court to set aside an order obtained by a violation of the rule. (Andersen v. Superior Court, 95.)
2. **UNAUTHORIZED MOTION—REMEDY.**—The proper practice in case of an unauthorized motion is to strike it from the files. (Id.)

See Criminal Law, 34.

**MOTOR VEHICLE ACT.**

1. **SPEED LIMITS—TURNING OF CORNERS—RULES INAPPLICABLE TO FIRE APPARATUS.**—The general restrictions as to speed and turning of corners applicable to vehicular traffic contained in the Motor Vehicle Act (Stats. 1917, p. 382), do not apply to a fire apparatus responding to an alarm, in view of the fundamental rule of construction that a statute is not applicable to the government or its agencies unless expressly included by name. (Balthasar v. Pacific Elec. Ry. Co., 302.)
2. **RIGHT OF WAY OF FIRE APPARATUS—CONSTRUCTION OF ACT.**—The provision of section 20 (m) of the Motor Vehicle Act that fire apparatus while being operated as such shall have right of way with due regard to the safety of the public has reference to the person required to yield such right of way, and notice to him is essential and a reasonable opportunity to stop or otherwise yield the right of way, necessary in order to charge him with the obligation to give precedence to the fire apparatus. (Id.)

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**MUNICIPAL CORPORATIONS.**

1. **CONSOLIDATION — CONDITIONS OF.**—Under the law of this state relative to consolidation of municipal corporations there may be a consolidation without any assumption of existing bonded indebtedness, a consolidation with the assumption of all the existing bonded indebtedness, and a consolidation with the assumption of only a part of the existing bonded indebtedness. (*People v. City of Los Angeles*, 56.)
2. **ELECTION — OFFICIAL BALLOT — STATEMENT OF PROPOSITION.**—The importance of stating upon the official ballot, at least in terms sufficiently specific to bring home to the voter knowledge of the general nature of the proposition upon which he is to vote, has been uniformly recognized by all our laws relative to elections under the so-called Australian ballot system. (*Id.*)
3. **ACT FOR CONSOLIDATING MUNICIPALITIES — CONSTRUCTION OF.**—It was the design of the act "to provide for the consolidation of municipal corporations," approved June 11, 1913 (*Stats.* 1913, p. 577), as amended April 29, 1915 (*Stats.* 1915, p. 311), that a proposition to consolidate municipal corporations should be stated upon the official ballot in terms sufficiently specific to tell the voter in a general way what the whole proposition was; and where there is a failure to indicate on the ballot that there is to be an assumption by one of the municipalities of a part of the bonded indebtedness of the other, the departure from the requisite form of ballot under the Consolidation Act is so substantial in nature that it cannot be held not to have affected the result, and there was no consolidation of the municipalities by the election. (*Id.*)
4. **CONVEYANCE OF LAND FOR PARK — CONDITIONS SUBSEQUENT — CONSTITUTIONAL LAW.**—The acceptance by a city of a deed to a tract of land upon the condition that the land should revert to the grantors unless the city should expend not less than five thousand dollars annually in improving it as a park, the total cost of the improvement aggregating fifty thousand dollars, created a liability to the grantors within the meaning of section 18 of article XI of the constitution, which precludes any city from incurring any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof. (*Chester v. Carmichael*, 287.)
5. **LOS ANGELES — BONDS ISSUED UNDER ACT OF 1901 — SALE BELOW PAR.**—Under section 2, subdivision 29, of the charter of the city of Los Angeles, providing that in the creation of a bonded indebtedness the general laws of the state shall be followed, and under section 6 of the act of 1901 (*Stats.* 1901, p. 29), providing that bonds voted and issued thereunder shall be sold for not less than their par value, the city is without power to sell such bonds

**MUNICIPAL CORPORATIONS (Continued).**

for less than par so as to enable them to bear six per cent instead of four and one-half per cent interest as provided in the ordinance calling the election. (*Peery v. City of Los Angeles*, 753.)

6. **PROHIBITION OF SALE BELOW PAR—ORDINANCE CALLING ELECTION—STATEMENT UNNECESSARY.**—The fact that the provision of the act of 1901 forbidding the sale of municipal bonds voted and issued under its procedure for less than their par value is not to be found in that portion of the statute prescribing what shall be contained in the proposition to be submitted to the voters for their approval does not affect the prohibition, since it is not essential, unless expressly made so, that all of the terms and conditions of the statute under which a bond election is to be held shall be set forth in the ordinances calling such election or detailed upon the ballot. (*Id.*)
7. **SALE OF UNSOLD BONDS BELOW PAR—ACT OF 1921—LACK OF AUTHORITY.**—An attempted sale by the city of Los Angeles of unsold bonds issued and voted under the act of 1901 for less than their par value in order to enable them to bear a greater rate of interest than provided in the ordinances calling the bond election is void, notwithstanding the act of 1921 (*Stats.* 1921, p. 844) providing for the sale of unsold bonds by municipalities at a price which will net the purchaser not more than the equivalent of six per cent per annum. (*Id.*)
8. **SALE OF BONDS UNDER ACT OF 1921—FRAUD UPON ELECTORS—CONTRACTUAL RELATIONSHIP.**—Where the city of Los Angeles voted a bonded indebtedness under the act of 1901, a status analogous to a contractual relation was created between the electors and the officials of the municipality, and the relation could not be changed by the sale of the bonds in the manner provided by the act of 1921, without working, in effect, a fraud upon the electors. (*Id.*)

See *Interest*, 1; *Occupational Tax*, 1; *Public Records*, 1.

**NEGLIGENCE.**

1. **PERSONAL INJURIES—PLEADING—INCONSISTENT DEFENSES.**—A defendant has a right to make inconsistent defenses, and he does so in an action for damages for personal injuries where in the first count of his answer he specifically denies the charge of negligence set forth in the complaint and in his second count alleges contributory negligence of the plaintiff. (*Starr v. Los Angeles Ry. Corp.*, 270.)
2. **INSTRUCTIONS—POSITION OF CONDUCTOR ON CAR—QUESTION OF FACT.**—In an action for damages for personal injuries sustained in falling from a "pay-as-you-enter" street-car, where the complaint counts upon the negligence of the company in suddenly

## NEGLIGENCE (Continued).

starting the car with a jerk while the plaintiff was alighting, and there is no general allegation of negligence, an instruction that if the conductor knew that the plaintiff was about to alight and that the alighting place was dangerous because the car was traveling at a fast rate of speed and would necessarily give a lurch upon reaching a certain street and he was not in his place on the car, the acts of the conductor, consisting in his failure to be at his post, would constitute negligence, and in such a case the verdict should be for plaintiff, is erroneous, as the duty of the conductor with reference to his place on the car is a question of fact, and there was no issue on this subject. (Id.)

3. CONTRIBUTORY NEGLIGENCE.—Such instruction is prejudicially erroneous, in that it fails to take into account the alleged contributory negligence of the plaintiff, this defense having been made. (Id.)
4. INSTRUCTION—PROXIMATE CAUSE OF INJURY.—Such instruction is erroneous in overlooking the principle that the negligence must be a proximate cause of the injury in order to justify recovery. (Id.)
5. EMPLOYEES OF CARRIERS—PLACE OF PERFORMANCE OF DUTIES.—The law fixes no particular place for the performance of the duties of the employees of a carrier; it merely fixes the obligation of the carrier to the passenger. (Id.)
6. LURCHING OF CAR.—Such instruction is erroneous in permitting the jury to find for the plaintiff, not only upon conduct of the conductor which could not be a proximate cause of the injury, but also if she was injured by a jerk or lurch of the car, necessarily incident to its operation over the intersection of a street at fast speed, and if the conductor was not in his place. (Id.)
7. PROXIMATE CAUSE OF INJURY—MATTERS OF LAW.—When the court specifically instructs the jury that in a certain state of facts they must bring in a verdict for the plaintiff, the jury has a right to assume that the court in that instance is determining as a matter of law that such negligence was the proximate cause of the injury and that there was no contributory negligence. (Id.)
8. INSTRUCTION TO FIND FOR PLAINTIFF—ESSENTIALS OF.—The rule is that where an instruction directs a verdict for plaintiff if the jury finds certain facts to be true, it must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion that the plaintiff is entitled to the verdict. (Id.)
9. JUSTIFIABLE RATE OF SPEED—AMBIGUOUS INSTRUCTION.—In such a case an instruction that the defendant may be justified under certain circumstances in running its cars at “a very fast” or “the fastest rate” of speed, while under other circumstances to run its cars at “a high” rate of speed might be negligence, and that if the jury found that the defendant operated its car at

**NEGLIGENCE (Continued).**

such a rate of speed while approaching the streets where the accident happened, and that said speed contributed to or was the proximate cause of the accident, the verdict should be for the plaintiff, is ambiguous, because it does not appear what rate of speed was considered by the court in the last sentence of the instruction. (Id.)

10. **ERRONEOUS INSTRUCTION.**—Such instruction is erroneous in that it allows the jury to bring in a verdict for plaintiff if the rate of speed “might be negligent.” In order that the plaintiff should recover because of the speed alone, it is essential that the speed should have been negligent under the circumstances. (Id.)
11. **PROXIMATE CAUSE—SPEED CONTRIBUTING TO.**—Such instruction is erroneous in the fact that the jury was instructed that if the speed contributed to or was the proximate cause of the accident, their verdict should be for the plaintiff. (Id.)
12. **CONSTRUCTION OF INSTRUCTION—CONTRADICTORY INSTRUCTIONS.**—Instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant, and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. (Id.)
13. **EVIDENCE — CONDUCT AND HABIT OF CONDUCTOR.**—In such a case, evidence as to the previous conduct and habit of the conductor as to sitting down and talking to the passengers was improperly received, not only because the matter was not in issue, but also because his habit was not competent. (Id.)
14. **PUBLIC EXPOSITION—SAFE CONDITION OF GROUNDS AND THOROUGHFARES.**—A duty is imposed upon a company conducting a public exposition to use ordinary care to keep its grounds, including the thoroughfares, in a safe condition for its invitees, even if there is no duty, as matter of law, resting upon it to provide separate thoroughfares for vehicles and pedestrians. (Johnstone v. Panama-Pacific I. E. Co., 323.)
15. **INJURY TO EXPOSITION VISITOR — ACT OF BAILEE OF CONCESSIONAIRE—PLEADING—SUFFICIENCY OF COMPLAINT.**—A complaint in an action against an exposition company for damages for personal injuries received by a visitor while walking along one of the thoroughfares used by pedestrians, from being struck by an electric carriage operated by another visitor and rented from a concessionaire, states a cause of action, where it is alleged, in addition to the failure to provide separate thoroughfares for pedestrians and electric cars, that the defendant was negligent in the granting of the concession, the granting of permission to operate

## NEGLIGENCE (Continued).

- it, and the granting of permission to the concessionaire to allow persons unskilled in the operation of such cars to operate them upon the grounds among the pedestrians. (Id.)
16. **BAILMENT—NEGLIGENCE OF BAILEE—LIABILITY OF BAILOR.**—The rule that a bailor is not liable to a third person for injuries caused through the negligent use of the bailment is not applicable where the bailor is under a duty to use ordinary care to protect the third person from injury. (Id.)
17. **DANGEROUS NATURE OF CONCESSION—KNOWLEDGE OF EXPOSITION COMPANY—LIABILITY TO INVITEE.**—An exposition company is liable for injuries received by an invitee from the operation by another invitee of an electric carriage, which the latter had rented from a concessionaire, where the vehicle was a dangerous appliance when in the hands of one unskilled in its management and the company had knowledge of such fact. (Id.)
18. **PERSONAL INJURIES—DECREASED EARNING CAPACITY—UNSUPPORTED FINDING—INADEQUATE DAMAGES.**—In this action for personal injuries, the finding that plaintiff did not lose any amount whatever by reason of the injuries which she would have earned at her profession of teaching if the injuries had not been sustained is held to be unsupported by the evidence, and the judgment is held to be wholly inadequate to compensate the plaintiff for her decreased earning capacity. (Torr v. United Railroads, 505.)
19. **MEASURE OF DAMAGES—ERRONEOUS VIEW OF LAW.**—While the trial court has almost unlimited discretion in fixing and determining the damages for pain and suffering and permanent injury, yet where the actual loss of earning capacity exceeds the total award for all cases, it will be concluded that the court acted upon an erroneous view of the law as to the measure of damages. (Id.)
20. **INADEQUATE DAMAGES—REVERSAL OF JUDGMENT.**—Where it is manifest under the express findings of the court, and the creditable and uncontradicted evidence in explanation thereof, that the allowance of damages is grossly inadequate to compensate for the injury due to decreased earning capacity, the judgment will be reversed. (Id.)
21. **APPEAL—REVERSAL OF JUDGMENT.**—A judgment in favor of the plaintiff in an action for personal injuries is an entirety, and the appellate court cannot reverse the portion of the judgment fixing the amount and affirm the portion fixing the liability of the defendant. (Id.)
22. **INJURY TO TAXICAB PASSENGER—EXCESSIVE SPEED—DUTY OF PASSENGER—ERRONEOUS INSTRUCTIONS.**—In an action for injuries received by a taxicab passenger through the overturning of a machine alleged to have been caused by its operation at an excessive rate of speed, an instruction charging in substance

NEGLIGENCE (Continued).

that if plaintiff knew that the automobile was being driven at an unlawful rate of speed, but nevertheless continued voluntarily to ride therein, having the opportunity to leave it, but not doing so, she would not be entitled to recover, and an instruction charging in substance that if plaintiff knew that the automobile was being driven at an unlawful rate of speed in time to have objected and left the machine or to have had the speed decreased prior to the accident, but made no objection and effort to be permitted to leave it, the verdict must be for defendants, constitute erroneous statements of the law. (Dowd v. Atlas T. & A. Service, 523.)

23. PRESUMPTION OF NEGLIGENCE—REBUTTAL BY PREPONDERANCE OF EVIDENCE—MODIFICATION OF INSTRUCTION.—In such action, an instruction that the “presumption” is that the overturning of the taxicab occurred through the negligence of the driver, and in order to rebut the presumption the defendants must show “by a preponderance of evidence” that the overturning was a result of an inevitable casualty or of some cause which human care and foresight could not prevent, was properly modified by changing the word “presumption” to the word “inference” and by striking out the words “by a preponderance of the evidence.” (Id.)

24. ELEVATOR ACCIDENT—REVERSAL ON APPEAL.—In view of section 4½ of article VI of the constitution, the judgment in favor of the plaintiff in an action for personal injuries sustained while attempting to enter an elevator on the premises of the defendant will not be reversed on appeal for alleged errors relating to the right of the plaintiff to recover, where it can be said as a matter of law from the record that the operator was guilty of negligence and that the defendant was liable therefor. (Bisinger v. Sacramento Lodge No. 6, 578.)

25. CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.—In an action for personal injuries sustained while attempting to enter an elevator, instructions withdrawing the defense of contributory negligence from the consideration of the jury were not erroneous where the proximate cause of the injury was not, as pleaded by defendant, the entry of the elevator while in motion, but the negligence of the operator in the operation of the elevator after the entry and fall of the plaintiff to the elevator floor. (Id.)

26. JUDGMENT NOT EXCESSIVE.—A judgment for \$28,191.91 in an action for personal injuries sustained in an elevator accident cannot be said to be excessive as a matter of law, where at the time of the trial, more than two years after the accident, the plaintiff was still able to get about only by the use of a wheel-chair, and her physician testified that one of her limbs was permanently injured, but that at some time she might be able to walk with the aid of a cane. (Id.)



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**NEGLIGENCE (Continued).**

27. **TRIAL — ARGUMENT — DISCRETION.**—Where, after it was stipulated that both parties should have an hour in which to argue the case, the defendant, without previous notice to the plaintiff, waived argument, and thus took plaintiff by surprise, the court, in the exercise of a sound discretion, properly allowed the plaintiff to make further argument. (Id.)
28. **OPERATION OF ELEVATOR—TESTIMONY OF PLAINTIFF—PHYSICAL IMPOSSIBILITY—JUDICIAL NOTICE.**—Judicial notice cannot be taken of the truth or falsity of the plaintiff's testimony as to the physical impossibility to have run the elevator after the accident as described by the witness. (Id.)
29. **INJURY FROM DEFECTIVE LIGHT-WELL IN SIDEWALK—LIABILITY OF OWNER—PLEADING—SUFFICIENCY OF COMPLAINT.**—A complaint in an action for an injury received by a pedestrian from stepping into a hole in a light-well in the sidewalk in front of the defendant's building stated a cause of action where it was alleged that the well was kept and maintained by the defendant for her sole and exclusive benefit and that the defendant knew, or by the use of ordinary diligence should have known, of the defective condition of the well, and it was not necessary to allege that defendant had been given twenty-four hours' notice by the proper municipal authority to repair the defect, as provided in the Vrooman street law. (Monsch v. Pellissier, 790.)
30. **REPAIR OF SIDEWALK—LIGHT-WELLS—DUTY OF PROPERTY OWNER.**—A property owner who maintains light-wells in the sidewalk in front of her building for the purpose of supplying light to the basement thereof is under an obligation to keep the gratings and glass blocks of which the wells consist in a condition which will render the sidewalk, of which they form a part, reasonably safe for use by those who may pass over it. (Id.)

See Assignments, 2; Bailments, 2-5; Innkeepers, 5; Pleading, 6.

**NEGOTIABLE INSTRUMENTS.** See Mortgages, 4.

**NEWSPAPERS.**

**GENERAL CIRCULATION—PRINTING IN ONE TOWN AND PUBLICATION AND CIRCULATION IN ANOTHER.**—The fact that the physical printing of a paper is done in one town, and the publication and circulation in another, does not prevent it from being a newspaper of general circulation within the meaning of section 4460 of the Political Code. (In re McDonald, 158.)

**NEW TRIAL.** See Criminal Law, 34.

**NOTICE.** See Appeal, 13, 20; Contracts, 2; Corporations, 12, 13; Mortgages, 5; Motor Vehicle Act, 2; Street Law, 4; Vendor and Vendee, 2, 14, 15; Waters and Water Rights, 11.

#### **OCCUPATIONAL TAX.**

1. **MUNICIPAL CORPORATIONS—SAN FRANCISCO—OCCUPATIONAL TAX ORDINANCE—CONSTRUCTION OF TERM “GOODS, WARES AND MERCHANDISE”—DEALERS IN SECOND-HAND BOOKS.**—The words “goods, wares and merchandise” as employed in article II, chapter 2, section 15, of the charter of the city and county of San Francisco, and in the ordinance, adopted pursuant to such charter provision, imposing license taxes on certain businesses, callings, trades, and employments, includes books, and a person engaged in the business of buying, selling, and exchanging second-hand books, as a principal occupation, and not as a mere incident to some other business, is required to pay the tax. (In re Holmes, 640.)
2. **PROCURING OF PERMIT FROM POLICE COMMISSIONERS—REASONABLE REGULATION.**—The requirement of the ordinance of the city and county of San Francisco imposing license taxes on certain businesses, callings, trades, and employments, that every person engaged in the business of buying, selling, or exchanging second-hand books shall procure a permit from the board of police commissioners before engaging in such business is a proper and reasonable regulation. (Id.)
3. **ISSUING OF PERMITS—POWER OF SUPERVISORS—CHARTER—CONSTITUTIONAL LAW.**—The investment of the board of police commissioners of the city and county of San Francisco with the general and unqualified power to grant or refuse permits to dealers in second-hand merchandise as contained in article VIII, chapter 3, section 9, of the charter, is not unconstitutional as conferring arbitrary powers upon the board. (Id.)

**OFFER.** See Contracts, 18.

**OPINION.** See Vendor and Vendee, 4.

**OPTION.** See Contracts, 1, 2, 10.

**ORDINANCES.** See Occupational Tax, 1.

**PARENT AND CHILD.** See Gifts, 1-5.

**PARKS.** See Municipal Corporations, 4.

#### **PARTIES.**

**EMPLOYER AND EMPLOYEE—JOINT TORT—LIABILITY.**—In the prosecution of actions for causes *ex delicto* all persons concerned in the

**PARTIES (Continued).**

commission of the tort may be joined as defendants, or either or any of them may be sued severally, and where an employer and an employee have participated in a tortious act against a third person, they may be jointly sued for damages. (*Gosliner v. Briones*, 557.)

See Accounting, 2, 3; Appeal, 3, 19; Assignments, 1, 4; Building Restrictions, 3; Criminal Law, 21; Deeds, 7; Fixtures, 4; Partnership, 2; Public Lands, 10, 13.

**PARTNERSHIP.**

1. **DEATH OF PARTNER—RIGHT OF SURVIVOR.**—As against a surviving partner, the administrator or executor of a deceased partner has, under the provisions of the Code of Civil Procedure, no power to handle the property or settle the affairs of the partnership, for the right to the possession, control, and disposition of the partnership property vests in the surviving partner, who has full authority to consummate all acts necessary to liquidate the affairs of the partnership. (*Minifie v. Rowley*, 481.)

2. **RECOVERY OF PARTNERSHIP PROPERTY—PLEADING—PARTIES.**—Where all the partners die before the liquidation of the partnership affairs has been completed, the executors of the will of the last surviving partner are entitled to bring an action for the recovery of partnership property without joining the executors of the wills or administrators of the estates of the other deceased partners. (*Id.*)

See Workmen's Compensation Act, 8.

**PATENTS.** See Public Lands, 5, 6, 13.

**PAYMENT.** See Promissory Notes, 1.

**PERFORMANCE.** See Bonds, 7, 8; Contracts, 3, 4.

**PERMITS.** See Waters and Water Rights, 1.

**PERSONAL INJURIES.** See Negligence.

**PERSONAL PROPERTY.** See Fixtures, 3.

**PERSONAL RIGHTS.**

**PURSUIT OF BUSINESS.**—It is the right of every person to pursue any lawful business or vocation he may select, subject to such legal restrictions and regulations as the proper governmental authority may impose for the protection and safety of society, and such right is available and must be protected and secured, and cannot be taken from those who possess it, without "due process of law." (*Brecheen v. Riley*, 121.)

**PETITIONS.** See Counties, 7; Guardian and Ward, 8.

**PHYSICIANS AND SURGEONS.** See Divorce, 9.

**PLACE OF TRIAL.** See Venue.

## **PLEADING.**

1. **ISSUES—EVIDENCE—APPEAL.**—It is settled law under the decisions of this state that where a case is tried without objection upon a showing of facts not pleaded, but supported by the evidence and covered by the findings, objection will not be considered on appeal that the pleadings do not present the issue. (Northwestern M. F. Assn. v. Pacific Co., 38.)
2. **WITHDRAWAL OF PLEADING.**—The withdrawal by defendant of his pleading admitting title to one-half of the property in appellant, carried with it the corresponding prayer for relief and left only the general prayer of the answer. (McCully v. McArthur, 194.)
3. **DEMURRER—ADMISSIONS.**—While it is well settled that a demurrer admits the truth of all facts that are well pleaded in the complaint, it does not confess any omitted circumstance which is indispensable to the cause of action upon which it is based, or essential to remedy an allegation specially challenged for uncertainty or ambiguity. (Goldstein v. Healy, 206.)
4. **ESSENTIALS OF COMPLAINT.**—All that is required of a plaintiff, even as against a special demurrer, is that he set forth in his complaint the essential facts of his case with reasonable precision, and with particularity sufficiently specific to acquaint the defendant of the nature, source, and extent of his cause of action. (Id.)
5. **PARTICULARITY REQUIRED—MATTERS IN KNOWLEDGE OF DEFENDANT.** Less particularity is required in the allegations of the complaint where the facts in it stated are such that the defendant, from their nature and his relation to them, has full information concerning them. (Id.)
6. **SUFFICIENCY OF COMPLAINT.**—In such a case the causal connection between the negligence and the injury are sufficiently shown in the complaint by the allegations, "that while on said platform . . . and while standing on said platform and talking to the said guest of defendants and with his back to said railing . . . , and relying upon said railing as aforesaid as protection against falling over and off of the said platform, the said plaintiff rested his hands lightly upon the said railing as aforesaid, and thereupon and by reason of the said rottenness and decomposition of the said wood of which the said railing consisted as aforesaid, and by reason of the carelessness and negligence of the defendants in so maintaining said railing, and not otherwise, the said railing gave way and

**PLEADING** (Continued).

broke, thereby precipitating and causing the plaintiff to fall off the said platform and to the ground below"; and such allegations are good as against both a general and special demurrer. (Id.)

See Appeal, 1, 10; Bonds, 3, 4, 7; Common Carriers, 5; Criminal Law, 2-7, 31-33; Estates of Deceased Persons, 1; Habeas Corpus, 1; Innkeepers, 4; Landlord and Tenant, 2; Negligence, 1, 15, 29; Partnership, 2; Public Health, 4; Sales, 10; Slander, 2, 4, 5; Superior Court, 7; Tax Sales, 3; Wills, 2, 3.

**POSSESSION.** See Deeds, 16.

**PRESCRIPTION.**

**INVASION OF RIGHT—ESSENTIAL ELEMENT.**—In order to establish a right by prescription, the acts by which it is sought to do so must operate as an invasion of the rights of the party against whom it is set up and afford ground for an action. (Canal & Irrigation Co. v. Worswick, 674.)

See Waters and Water Rights, 13.

**PRESUMPTIONS.** See Appeal, 1, 17; Community Property, 5; Deeds, 10; Evidence, 3; Taxation, 3.

**PRINCIPAL AND AGENT.** See Agency.

**PROFITS.** See Contracts, 14.

**PROMISSORY NOTES.**

**NOTE—NONPAYMENT—SUFFICIENCY OF EVIDENCE.**—In this action to recover on a promissory note executed in renewal of one about to become barred by the statute of limitations, wherein the only question was whether or not the original note had been paid, the finding that the obligation had not been discharged is held to be sufficiently supported by the testimony in the record, which includes evidence of the payment of interest regularly for several years on the renewal note. (Frazier v. David, 724.)

See Corporations, 3, 8, 10, 11; Mortgages, 4, 5; Statute of Limitations, 2.

**PUBLICATION.**

**DEFINITION OF WORD "PRINT."**—The definition of the word "print" is to put in print, or cause to be put in print or issued from the press; carry or send forth in print; publish. (In re McDonald, 158.)

See Newspapers, 1.

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**PUBLIC HEALTH.**

1. **QUARANTINE—POWER OF STATE BOARD.**—By virtue of the broad power conferred by sections 2979 and 2979a, of the Political Code and by the Public Health Act (Stats. 1907, p. 893), the state board of health has power to order the quarantine of persons who have come in contact with cases and carriers of contagious diseases. (In re Culver, 437.)
2. **METHOD OF QUARANTINE.**—Under section 13 of the Public Health Act, as amended in 1911 (Stats. 1907, p. 893; Stats. 1911, p. 565), which provides certain rules governing cases of quarantine, the accepted method of quarantining a person is by confining him in the house in which he is living. (Id.)
3. **REMOVAL OF QUARANTINE PLACARD—MISDEMEANOR UNDER HEALTH ACT.**—Under section 13 of the Public Health Act, as amended in 1911 (Stats. 1907, p. 893; Stats. 1911, p. 565), which provides certain rules governing cases of quarantine, the removal of a quarantine placard affixed to a place of residence under an order of the state board of health is a misdemeanor. (Id.)
4. **PLEADING—SUFFICIENCY OF COMPLAINT.**—A complaint charging the removal of a quarantine placard affixed to a place of residence under an order of the state board of health states a public offense under the Public Health Act, regardless of whether it sufficiently states such an offense under section 377a of the Penal Code, as alleged in the complaint. (Id.)

**PUBLIC LANDS.**

1. **TITLE IN UNITED STATES—TAXATION BY STATE.**—Land belonging to the United States is not subject to taxation by the state, and a sale of such land for taxes levied thereon before it is listed to the state and before the applicant to purchase the land from the state is in possession is void. (Secret Valley Land Co. v. Perry, 420.)
2. **CONFLICTING CLAIMANTS—HOLDER OF PRIOR CERTIFICATE—LACHES—STATUTE OF LIMITATIONS.**—A claim of title to state land based upon a certificate of purchase issued prior to the listing of the land to the state by the United States is neither barred by laches nor by the provisions of section 343 of the Code of Civil Procedure, as against a claim under a subsequent certificate of purchase issued after the land had been sold to the state under a void tax sale, where the latter merely paid the taxes for several years and neither of the claimants had ever been in possession or made any claim or demand upon the other until the latter commenced an action to quiet title. (Id.)
3. **QUIETING TITLE—ADVERSE CLAIM.**—One holding the legal title or a paramount claim to the legal title is not called upon to take action against a hostile claim which is not of a nature to ripen into a valid adverse title. (Id.)

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PUBLIC LANDS (Continued).

4. **MERE CLOUD UPON TITLE—CONTINUING CAUSE OF ACTION.**—An outstanding adverse claim which amounts only to a cloud upon the title is a continuing cause of action and is not barred by lapse of time until the hostile claim is asserted in some manner to jeopardize the superior title, and so long as the claim lies dormant and inactive the owner of the superior title has the privilege of allowing it to stand indefinitely, and each day's assertion of the claim gives a renewed cause of action to quiet title until such action is brought. (Id.)
5. **UPLANDS BORDERING ON LAKE—PATENT.**—A United States patent to uplands bordering on a lake conveys title to the actual margin of the lake, although the surveyed meander line does not conform to the actual water line of the lake, and a state patent under the act of March 24, 1893, to land between such meander line and the lake, conveys no title, in the absence of proof of a recession or drainage of the waters of the lake. (Craig v. White, 489.)
6. **ISSUANCE OF PATENT—MANDAMUS—RES ADJUDICATA.**—In a proceeding in *mandamus* originally brought in the supreme court to compel the state surveyor-general to issue a patent to land owned by the state based upon a certificate of purchase alleged to have been validated by an act of the legislature, the judgment dismissing the proceeding is conclusive on the state and of the rights of the petitioner under such certificate both as to the claims set forth therein and as to any others which might have been presented. (Reynolds v. Churchill Co., 543.)
7. **CONTEST—EVIDENCE—JUDGMENT IN MANDAMUS PROCEEDING—CONSTRUCTION.**—Where, during the pendency of a contest between private claimants for the right to purchase state lands, one of them brought a *mandamus* proceeding in the supreme court to compel the state surveyor-general to issue a patent to the petitioner, notwithstanding the pendency of the contest, the judgment dismissing the proceeding is binding upon the petitioner and admissible in the trial of the contest, notwithstanding the recital therein "that the rights of the contestants are not foreclosed by our decision herein" (178 Cal. 554), since from the nature and character of the decision, as well as the context, the term "contestant" was intended to refer to the rights of those who were contesting the claims of the petitioner, and the court did not intend to change the usual effect of the whole opinion and judgment by such clause. (Id.)
8. **UNSEGREGATED SWAMP AND OVERFLOWED LAND—SALE.**—Under section 3493m of the Political Code, swamp and overflowed land is subject to sale, even if unsegregated. (Id.)
9. **SHORE OF LITTLE KLAMATH LAKE—CHARACTER OF LAND.**—In this contest between private parties for the right to purchase, as swamp



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**PUBLIC LANDS (Continued).**

and overflowed land, certain land forming a part of the bed of Little Klamath Lake, the conclusion of the district court of appeal that the government surveys of 1873 established the character of the land as sovereign and not as swamp and overflowed land is held to be erroneous, and that it cannot be declared as a matter of law, from facts of which the court takes judicial notice, that the land is not swamp and overflowed land. (Id.)

**10. CONTEST—STATE NOT A PARTY—JUDGMENT—LACK OF ESTOPPEL.—**

While it is made the duty of the state surveyor-general under section 3416 of the Political Code to issue his patent or certificate to the successful party in a contest for the right to purchase state lands, the state is not a party to the contest and is not estopped by the judgment therein. (Id.)

**11. STIPULATION AS TO CHARACTER OF LANDS—FORECLOSURE OF INQUIRY**

**—EVIDENCE.—**Where, in a contest for the right to purchase state lands, both parties claimed that the lands were swamp and overflowed lands, such question was not an issue, and evidence as to the character of the lands was, therefore, wholly ineffectual, and immaterial. (Id.)

**12. DECISION AS TO CHARACTER OF LAND—RIGHTS OF UNITED STATES.—**

A decision of the supreme court in a contest between private persons for the right to purchase land on the shores of Little Klamath Lake that the land is sovereign land is not prejudicial to the rights of the state as against the United States, growing out of the act of the legislature (Stats. 1903, p. 4), ceding certain lands in such lake to the United States for reclamation purposes, the government not being a party to the proceeding. (Id.)

**13. CONTEST—JUDGMENT IN MANDAMUS PROCEEDING—LACK OF ESTOPPEL.—**

A judgment in a *mandamus* proceeding to compel the state surveyor-general to issue a patent to state land that the land was sovereign land is not conclusive upon a contestant of the petitioner's right to purchase, where such contestant was not a party to the *mandamus* proceeding. (Franklin v. Churchill Co., 555.)

**14. TITLE OF STATE TO SWAMP AND OVERFLOWED LANDS—IDENTIFICATION AND PATENT SUBSEQUENT TO GRANT—RELATION OF TITLE.—**

Under the act of Congress of September 28, 1850, granting swamp and overflowed lands to the state, full beneficial enjoyment thereof passed to the state at that time subject only to the contingencies incident to identification, and when the lands were identified and a patent therefor issued to the state on June 10, 1896, the title so transferred related back to the year 1850, and inured to the benefit of the state and its successors in interest for all purposes, as if the legal title had passed at the date of the act. (Canal & Irrigation Co. v. Worswick, 674.)

See Waters and Water Rights, 8.

**PUBLIC OFFICERS.**

1. **STATUTES—COUNTY ENGINEER ACT—CREATION OF PUBLIC OFFICE.—**  
The County Engineer Act (Stats. 1919, pp. 1290, 1295) contemplates the creation of a county office and does, in fact, provide for something more than a mere employment by the board of supervisors of a person to be known as the county engineer. (Coulter v. Pool, 181.)
2. **PUBLIC OFFICE—CHARACTER OF—HOW DETERMINED.—**The definition and application of the words "public office" depend not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation. (Id.)
3. **DEFINITION.—**A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. (Id.)
4. **NATURE OF PUBLIC OFFICE.—**A public officer is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. Their characteristics are a fixed tenure of position, the exaction of a public oath of office, and perhaps, an official bond, the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and the payment of his salary from the general county treasury. (Id.)
5. **COUNTY OFFICER—DEFINITION.—**A county officer is a public officer and may be specifically defined to be one who fills a position usually provided for in the organization of counties and county governments, and is selected by the political subdivision of the state called the "county" to represent that governmental unit, continuously and as part of the regular and permanent administration of public power, in carrying out certain acts with the performance of which it is charged in behalf of the public. (Id.)
6. **COUNTY ENGINEER ACT—FAILURE TO SPECIFY COMPENSATION.—**  
The County Engineer Act is practically inoperative because it specifies no compensation for the office, and any ordinance of a board of supervisors attempting to fix the salary of a person ap-

**PUBLIC OFFICERS (Continued).**

pointed to the position of county engineer is void to that extent, because the constitution imposes upon the legislature, exclusively, the duty of regulating the compensation of all county officers, unless a county has adopted a charter in accordance with the provisions of sections 7½ or 7½a, article XI, of the constitution, or there is some other express constitutional exception. (Id.)

7. **COUNTY OFFICERS—FIXING SALARY—DELEGATION OF POWER—CONSTITUTIONAL LAW.**—The state legislature cannot directly delegate to the board of supervisors of the various counties the power of fixing the compensation of a county officer. (Id.)

See Counties, 2, 6; Public Records, 1.

**PUBLIC POLICY.** See Bailments, 5.

**PUBLIC RECORDS.**

1. **PRELIMINARY ESTIMATES AND DETAILS OF MUNICIPAL WATER SUPPLY SYSTEM—HETCH HETCHY PROJECT OF SAN FRANCISCO—CHARACTER OF DOCUMENTS AND DATA BEFORE APPROVAL BY CITY ENGINEER.**—The preliminary estimates, plans, drawings, maps, and other data prepared by the assistants and subordinates of the city engineer of the city and county of San Francisco for submission to him for his approval in connection with the acquisition and construction of the municipal water supply system, known as the Hetch Hetchy project, of which project the engineer is in charge as an officer of the board of public works, are not, before official approval, "public records in the office of an officer" open to inspection by any citizen of the state, within the meaning of sections 1888, 1892, 1893, and 1894 of the Code of Civil Procedure, section 1032 of the Political Code, and section 6 of chapter 1 of article VI and section 13 of article XVI of the charter of the city and county of San Francisco. (Coldwell v. Board of Public Works, 510.)
2. **RIGHT OF INSPECTION AS "OTHER MATTERS" IN OFFICE OF PUBLIC OFFICER—CONSTRUCTION OF SECTION 1032, POLITICAL CODE.**—The preliminary estimates and details prepared by the assistants and subordinates of the city engineer of the city and county of San Francisco for submission to him for his approval in connection with the Hetch Hetchy project are, before approval, of such character as constitutes them "other matters" within the meaning of section 1032 of the Political Code, which provides that the public records and other matters in the office of any officer are at all times, during office hours, open to the inspection of any citizen of the state. (Id.)
3. **CONFIDENTIAL CHARACTER IMMATERIAL.**—The right of a citizen under section 1032 of the Political Code to inspect preliminary estimates

## PUBLIC RECORDS (Continued).

and details in connection with the acquisition and construction of a municipal water supply system as "other matters in the office of any officer" is not affected by the fact that the engineer had communicated them to the city attorney as confidential matter in pending and anticipated litigation affecting the project. (Id.)

4. INSPECTION BY CERTAIN CITIZENS—WAIVER OF PRIVILEGED CHARACTER.—Where preliminary estimates and details in connection with the acquisition and construction of a municipal water supply project were permitted by the city engineer to be inspected by some citizens, the right of other citizens to inspect cannot be refused on the ground that the matter was of a confidential character. (Id.)
5. INSPECTION OF DATA IN OFFICE OF CITY ENGINEER—SAN FRANCISCO HETCH HETCHY PROJECT.—Judgment modified and affirmed on the authority of *Coldwell v. Board of Public Works of the City and County of San Francisco et al.*, ante, p. 510. (San Francisco Bureau etc. v. Board of Public Works, 795.)

QUARANTINE. See Public Health, 1, 2.

QUIETING TITLE. See Appeal, 3; Courts, 2; Public Lands, 4; Tax Sales, 2-4; Waters and Water Rights, 11.

RAILROADS. See Vendor and Vendee, 2.

## REAL ESTATE BROKERS' ACT.

1. VALIDITY OF.—The act known as the "Real Estate Act" (Stats. 1919, p. 1252) violates none of the fundamental principles of law, but is in harmony with them, in that it is a measure looking to the protection of the public, and provides a method of procedure in all respects ample to the protection of the rights of the licensee, and must be followed in order that the license can be legally revoked by the commissioner. (Brecheen v. Riley, 121.)
2. ACTION OF REAL ESTATE COMMISSIONER—QUASI-JUDICIAL CAPACITY. The commissioner under the "Real Estate Act" acts in a quasi-judicial capacity when passing upon applications for a license, and when hearing petitions to revoke, and revoking, a license issued under the act, for he is deciding property rights and determining what shall be decreed in the matters before him, all of which is the exercise of a "judicial function"; but such commissions are not courts in the strict sense nor exercising judicial power as meant by the constitution conferring power upon courts, and statutes creating such commissions are constitutional. (Id.)
3. CHARGE OF DISHONEST DEALING—JURISDICTION.—A charge against a person laid before the real estate commissioner of acts "involv-

**REAL ESTATE BROKERS' ACT (Continued).**

ing embezzlement, false representations, and gross moral turpitude" constitute "dishonest dealing," within the meaning of the phrase used in the Real Estate Act, and presents an issue which the commissioner is clearly authorized to hear and has jurisdiction to determine. (Id.)

4. **CONSTITUTIONALITY OF ACT.**—The "Real Estate Act" (Stats. 1919, p. 1252) is constitutional. (Id.)

**REFORMATION OF INSTRUMENTS.** See Contracts, 15-17; Sales, 6-9.

**RELEASE.** See Bonds, 1, 4, 5; Estates of Deceased Persons, 3.

**REMEDIES.** See Mandamus, 1; Motions, 2; Sales, 4.

**RESCISSION.** See Sales, 3-5; Vendor and Vendee, 3, 8, 10, 11, 13, 14.

**RESIDENCE.**

1. **QUESTION OF INTENT.**—Where a person has two dwellings in different places and resides a part of his time in one place and a part of the time in another alternately, the question which of the two places is his legal residence is almost altogether a question of his intent. (Chambers v. Hathaway, 104.)
2. **EVIDENCE—REGISTERING AS VOTER—AFFIDAVIT—DECLARATION.**—An affidavit made for the purpose of registering as a voter in which affiant states that his residence is at a certain place constitutes a declaration by affiant that at that time his legal residence is in the place indicated, and if unexplained and there is no other evidence of a subsequent change of intent, it would be sufficient to uphold a finding to that effect in a proceeding by the state controller, under the Inheritance Tax Act, for the collection of inheritance tax; but where the evidence shows that after making the affidavit he formed a decided intention to have his residence at his former home in a different state which he used repeatedly as a residence, the union of act and intent as required by the Political Code was sufficiently manifested to establish his residence in the latter place. (Id.)

See Estates of Deceased Persons, 14, 15.

**RES JUDICATA.** See Public Lands, 6, 13.

**RESTRAINT OF TRADE.** See Contracts, 23, 24.

**RIPARIAN RIGHTS.** See Waters and Water Rights, 6, 12.

## SALES.

1. **RECOVERY OF DEPOSIT—PLEADING—THEORY OF ACTION—INAPPLICABILITY OF CODE PROVISIONS.**—Where an action to recover the deposit paid under an agreement to “furnish and install” gas engines was not upon an express warranty, or the action primarily one to reform a contract and recover damages for its breach as reformed, neither the provisions of section 3308 of the Civil Code, which establishes the measure of damages for the breach of an agreement by the seller to sell personal property not fully paid for in advance, nor of section 2313 of the same code, which prescribes the rule of compensation for the detriment caused by the breach of a warranty of the quality of personal property, were applicable. (*Mahoney v. Standard Gas Engine Co.*, 399.)
2. **WARRANTY OF MANUFACTURED ARTICLE—INAPPLICABILITY OF CODE SECTION.**—An action to recover the deposit paid under an agreement to “furnish and install” gas engines does not fall within section 1770 of the Civil Code, which declares that one who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose, in the absence of an allegation that the defendant manufactured or agreed to manufacture the engines. (*Id.*)
3. **CONTRACT FOR SALE OF GAS ENGINES — RESCISSION — REFUSAL TO ACCEPT.**—In view of section 1689 of the Civil Code, which declares that a party to a contract may rescind it where through the fault of the party as to whom he rescinds the consideration for his obligation fails, in whole or in part, the refusal of the purchaser to accept engines tendered which would not develop the stipulated horse-power was a rescission of the contract, without an express statement of rescission. (*Id.*)
4. **FAILURE OF CONSIDERATION—ACTION FOR MONEY HAD AND RECEIVED.** Where a claim for the recovery of a deposit paid on account of the purchase price of gas engines is based upon an alleged total failure of consideration in that the engine tendered did not comply with those to be furnished under the contract, an action for money had and received is maintainable since in such a case the law raises a promise on the part of the seller to repay the money, and without any previous request. (*Id.*)
5. **TOTAL FAILURE OF CONSIDERATION—RECOVERY OF DEPOSIT—FORMAL RESCISSION UNNECESSARY.**—Where gas engines tendered were of no value to the purchaser because of their failure to develop the stipulated horse-power, the failure of consideration was total, and no formal rescission of the contract was necessary before suit to recover the deposit. (*Id.*)
6. **CONTRACT—MUTUAL MISTAKE—REFORMATION.**—In view of section 3299 of the Civil Code, a contract in writing may be revised for

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**SALES (Continued).**

a mutual mistake, so as to truly express the intention of the parties. (Id.)

7. **RECOVERY OF DEPOSIT—REFORMATION OF CONTRACT—MUTUAL MISTAKE—FINDING.**—In an action to recover the deposit paid under a contract for the purchase of gas engines, wherein the plaintiff also sought a reformation of the contract so as to include a provision as to horse-power alleged to have been omitted by mutual mistake, a finding that the omitted provision was a mistake on the part of the parties to the contract was the equivalent of a finding that it was a mutual mistake. (Id.)
8. **CONTRACT—REFORMATION—WHEN UNNECESSARY.**—Where the reformation of a contract is not for the purpose of enforcing it as reformed or to recover damages for its breach, but to show a total failure of consideration, it is not necessary that it be formally revised. (Id.)
9. **REFORMATION OF CONTRACT—FINDING.**—A finding in an action to reform a contract for the purchase of gas engines that plaintiff executed the contract in the "belief" that it contained a provision calling for the development by the engines of certain brake horse-power, justifies a reformation of the contract, in view of the general finding that the omission was a mistake on the part of the parties. (Id.)
10. **PLEADING—OVERRULING OF DEMURRER—ERROR WITHOUT PREJUDICE.** In such action, error in overruling the demurrer to the complaint for failure to allege whether the omission of the provision as to the engines developing a certain horse-power was a mutual mistake, or a mistake of the plaintiff which the defendant at the time knew or suspected, was not prejudicial, where the answer contained a denial that there was any mistake made by either party and alleged that the contract embodied all conditions intended to be contained therein. (Id.)

See Contracts, 25, 27.

**SAN FRANCISCO CHARTER.** See Occupational Tax, 1.

**SCHOOL LANDS.** See Appeal, 3-5.

**SERVICE.** See Contempt, 1.

**SERVICES.** See Contracts, 12, 14.

**SHERIFFS.** See Counties, 6; Juries and Jurors, 3.

**SIDEWALKS.** See Negligence, 30.



**SLANDER.****1. SLANDER OF TITLE—VENDOR AND VENDEE—GUARANTY OF TITLE.—**

In an action by a vendor against a title insurance company for slander of title, where it appears from the complaint that the plaintiff presented to his vendee a duplicate certificate of title issued by the registrar under the Torrens land law, that the purchaser demanded as additional assurance of title a guaranty of the defendant, and this the plaintiff agreed to furnish, that the defendant declined to furnish such a guaranty of title unless a certain judgment of record was specifically released, that the plaintiff agreed to secure such release, and paid a certain sum for such purpose to the defendant, that thereupon the defendant wrote its guaranty of the title to the purchaser, and the plaintiff secured the purchase money, the vendor is not entitled to recover the amount which the defendant required him to pay as a condition of entering into a guaranty with a third person, plaintiff's vendee, leaving the defendant obligated by its guaranty. (*Fry v. Title Ins. & Trust Co.*, 168.)

**2. PLEADING—SUFFICIENCY OF COMPLAINT.—**

In an action for slander the complaint states a cause of action where it alleges that plaintiff is a skilled teacher, that defendant stated to a newspaper reporter, knowing and intending that the statement would be given further circulation through the public press, that plaintiff was to be dropped from the staff of city school-teachers for the reason that the city superintendent considered his position as it existed "a weak spot in the public school system of instruction," that such statement was false, malicious, and unprivileged, and that the defendant thereby publicly accused plaintiff of being unfit and incompetent to be employed in his profession. (*Oberkotter v. Woolman*, 500.)

**3. DEFINITION OF OFFENSE.—**

Slander is a false and unprivileged publication, other than libel, which tends to directly injure one in respect to his office, reputation or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit, or which by natural consequence causes actual damage. (*Id.*)

**4. GENERAL AND SPECIAL DAMAGES—PLEADING.—**

In an action for slander a sufficient allegation of general and special damages is made by the averment that the false, malicious, and unprivileged publication by the defendant exposed plaintiff to hatred, contempt, ridicule, and obloquy, and was made by the defendant to so expose him, and that by reason of the slander plaintiff has suffered great mental anguish, and has been, and is, and from henceforth will be greatly injured and prejudiced in his reputation as a

**SLANDER (Continued).**

school-teacher, and has lost and will continue to lose and be deprived of great gains and profits which would otherwise have accrued to him in his calling, occupation and profession. (Id.)

5. **AMENDMENT OF COMPLAINT—STATUTE OF LIMITATIONS.**—An action for slander is not barred by section 340 of the Code of Civil Procedure by reason of the amendment of the complaint after the expiration of the period provided by such section, where the original complaint was filed within time, and the only difference in the two statements of the cause of action was that in the original complaint it was asserted that defendant knowing and intending that the words would be published in a newspaper communicated them to a reporter, and they were so published, the article, quoting the words being given in full, while the amended complaint alleged that the false and unprivileged communication was made to the same party, the defendant knowing and intending that it would be given further circulation through the public press, the exact words being set out. (Id.)

**SPECIFICATIONS.** See Appeal, 21; Findings, 1.

**STATE WATER COMMISSION.** See Waters and Water Rights, 1.

**STATUTE OF LIMITATIONS.**

1. **DEATH OF PARTY—RUNNING OF STATUTE.**—Where a cause of action arises in the lifetime of a person entitled to sue, his death does not interrupt the running of the statute of limitations in the absence of some statutory provision to the contrary, and this rule extends to the provisions of section 583 of the Code of Civil Procedure, which is in effect a statute of limitations upon the time for bringing a cause to trial. (Andersen v. Superior Court, 95.)
2. **PROMISSORY NOTE—PAYMENT OF INTEREST—LETTER—NEW CONTRACT.**—Where payment of interest on a promissory note after the expiration of the statutory period of limitation is accompanied by a letter evidencing such payment, the acknowledgment of the debt is "contained in some writing," within the meaning of section 360 of the Code of Civil Procedure, even though the letter in and of itself does not contain a distinct recognition of the liability. (Minifie v. Rowley, 481.)
3. **DEBTOR AS EXECUTOR—TOLLING OF STATUTE.**—Where a debtor becomes the executor of the will of his creditor, he is chargeable with the amount of the indebtedness as for so much money in his hands and continues liable therefor, irrespective of the running of the period of the statute of limitations against the debt itself, by reason of the change in the character of his obligation due to his intervening fiduciary capacity. (Id.)

See Contracts, 4, 5; Public Lands, 2, 4; Slander, 5.

**STATUTES.** See Criminal Law, 32; Deeds, 10; Vendor and Vendee, 2.

**STATUTORY CONSTRUCTION.**

1. **CODES AND AMENDMENTS NOT RETROACTIVE.**—The Civil Code expressly provides that no part of it is retroactive unless expressly so declared, which rule applies to the amendments to that code as well; and it is a general rule of statutory construction that statutes should not be construed retrospectively unless it is clear that such was the legislative intention. (Estate of Frees, 150.)
2. **Cardinal rules of statutory construction** require an interpretation of a statute which will give effect to the legislative intent, if consistent with the real object and purpose of the statute. (Coulter v. Pool, 181.)
3. **DECLARATION OF LEGISLATURE—EFFECT OF.**—A legislative declaration, whether contained in the title or body of a statute, that the statute was intended to promote a certain purpose is not conclusive on the courts and they may and must inquire into the real, as distinguished from the ostensible, purpose of the statute, and determine the fact whether, after all has been said and done by the legislature, the statute, in its scope and effect, departs from the declared legislative design and contravenes the fundamental and supreme law of the state. (Id.)

See Community Property, 1; Criminal Law, 9; Dismissal, 5; Motor Vehicle Act, 1, 2.

**STOCK AND STOCKHOLDERS.** See Corporations, 1, 4; Gifts, 1, 2.

**STOCKHOLDERS' LIABILITY.** See Corporations, 9.

**STREET LAW.**

1. **ACT OF 1913 — JURISDICTION TO ORDER STREET IMPROVEMENT — GRADES.**—The Street Improvement Act, as adopted in 1913, authorizes the physical improvement and change of grade of a public street independently of a concurrent establishment, change, or modification of the official or paper grade in the same proceeding; and a city council has jurisdiction to proceed under this statute with a view to contracting for street work in conformity to previously established grades. (McNutt v. City of Los Angeles, 246.)
2. **AUTHORITY TO ESTABLISH GRADE FOR TUNNEL.**—The Street Improvement Act of 1913 confers authority to establish a grade for a tunnel to be used as a public thoroughfare. (Id.)
3. **RESOLUTION OF INTENTION—DESIGNATION OF GRADE—REFERENCE TO PLANS AND SPECIFICATION.**—A resolution of intention to improve a tunnel used as a public thoroughfare in a city is not insufficient,

**STREET LAW (Continued).**

although not designating the grade upon which the work is to be done, where it provides that the work shall be constructed as shown on various plans and specifications referred to for more particular description and on file in the city engineer's office, as it will not be inferred that all the information required was not contained in such specifications, in the absence of a showing to the contrary. (Id.)

4. **NOTICE OF PROPOSED IMPROVEMENT—AFFIDAVIT OF.**—Under the Street Improvement Act of 1913, the making and filing of an affidavit by the city clerk of mailing post-cards to the property owners within the assessment district containing the notice required by the statute of the proposed improvement, before the work is ordered, is mandatory and jurisdictional as affecting the power of the city council to pass an ordinance ordering the performance of the work; and such an affidavit is insufficient and the city council acquires no jurisdiction to order the work, where the affidavit refers to the location of the work proposed as, "for the improvement of Broadway tunnel," while the resolution of intention included the improvement of "Broadway tunnel between Temple Street and Sunset Boulevard, California Street between North Broadway and Hill Street, North Broadway between Temple Street and California Street." (Id.)

5. **UNLAWFUL CHANGING OF GRADE—ACTION FOR DAMAGES—INTEREST.** In an action for damages against a city arising from the unlawful changing of the street grade in front of plaintiff's premises by the city, the claim being one for unliquidated damages does not draw interest before judgment. (Id.)

See Negligence, 29.

**SUCCESSION.** See Estates of Deceased Persons, 6, 7.

**SUPERIOR COURT.**

1. **INCREASE IN NUMBER OF JUDGES OF COUNTY—POWER OF GOVERNOR.** The governor of the state is authorized to temporarily increase the number of superior court judges in a county by a request that judges from other counties sit within that county as superior court judges. (Athearn v. Nicol, 86.)
2. **DRAINAGE DISTRICT—DETERMINING VALIDITY OF ASSESSMENTS—JURISDICTION OF COURT.**—Assuming that the matter pending before a superior court of hearing and determining a question as to the validity and proper apportionment of assessments of a drainage district is a judicial one, as the statute expressly declares, the court has jurisdiction of the matter, and three superior court judges selected by the Governor to sit in that court in the matter have jurisdiction to dispose of the same. (Id.)

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**SUPERIOR COURT (Continued).**

3. **DISQUALIFICATION OF JUDGE.**—The judge of the superior court of a county is disqualified, under subdivision 5 of section 170 of the Code of Civil Procedure, from hearing proceedings to determine the validity and proper apportionment of assessments of a drainage district when they affect or relate to any real property within his county. (Id.)
4. **EXTRA JUDGES.**—There may be as many sessions of the court as there are superior court judges in a county, including those assigned thereto by the Governor and those acting *pro tempore*, and all of these judges can also sit together at one time for the trial of a case; and the constitution contemplates a session held by one or more judges as well as by one and by all. (Id.)
5. **JUDGES SITTING TOGETHER.**—The constitution authorizes three judges of the superior court, if they choose, to sit together for the purpose of hearing any proceeding over which the court itself has jurisdiction. (Id.)
6. **DETERMINATION BY MAJORITY.**—The general rule is that where authority is conferred upon a court of more than one judge, the majority can render decisions of the court in the absence of express statutory or constitutional provision to the contrary. (Id.)
7. **JURISDICTION — SUFFICIENCY OF COMPLAINT.**—If a court sitting to determine the validity and apportionment of assessments of a drainage district has jurisdiction and authority to pass upon the validity of the assessments and the questions arising with relation thereto, the sufficiency of the complaint or document filed to invoke that jurisdiction is one to be determined by it upon the hearing and does not affect its jurisdiction to pass thereon. (Id.)
8. **DRAINAGE DISTRICT—DETERMINATION OF VALIDITY OF ASSESSMENTS — JUDICIAL PROCEEDINGS.**—The legislature, under the act relating to the issuance of bonds for assessments for improvements in the Sacramento and San Joaquin drainage district (Stats. 1919, p. 1092, secs. 4, 5), contemplated a court proceeding, and provided that such proceeding should be commenced in the superior court, and upon a judgment by it affirming the validity of the bonds no further attack is permitted thereon. (Id.)

**SUPERSEDEAS.** See Mortgages, 2.

**SUPERVISORS.** See Public Officers, 6.

**SURETIES.** See Bonds, 2, 3, 6, 7, 9; Estates of Deceased Persons, 3.

**SWAMP AND OVERFLOWED LANDS.** See Public Lands, 8, 9, 11, 14; Waters and Water Rights, 9.

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TAXATION.

1. **ALIEN POLL TAX LAW—UNCONSTITUTIONALITY OF.**—The alien poll tax law of California cannot be enforced, for the reasons that by its enforcement the state of California would deny to persons within its jurisdiction the equal protection of its laws, in violation of the provision of section 1 of the fourteenth amendment to the constitution of the United States that no state shall "deny to any person within its jurisdiction the equal protection of the laws." (In re Kotta, 27.)
2. **CORPORATE FRANCHISES — METHOD OF VALUATION — DISCRETION OF BOARD OF EQUALIZATION—CONSTITUTIONAL LAW.**—Under section 14 of article XIII of the constitution, requiring that all franchises, other than those expressly provided for in the section, shall be assessed "in the manner to be provided by law," it was permissible for the legislature to commit to the board of equalization the duty of selecting the mode of ascertaining the cash value of the different elements dealt with in determining corporate excess instead of requiring the board to compute assessments according to a value-finding rule prescribed by the legislature. (Utah Construction Co. v. Richardson, 649.)
3. **ASSESSMENT BOARDS—PERFORMANCE OF OFFICIAL DUTY—PRESUMPTION.**—It is a rule applicable to assessors and to boards having assessing powers that it is presumed that the assessing officers have properly performed the duties entrusted to them, and, consequently, that their assessments are both regularly and correctly made. (Id.)
4. **RECOVERY OF FRANCHISE TAXES—BASIS OF TAXATION—BURDEN OF PROOF.**—In an action to recover corporation franchise taxes paid to the state under protest, the burden is upon the plaintiff to prove its contention that the taxes were not based on the valuation of the franchise. (Id.)
5. **EXCESSIVE TAXES—REVIEW.**—In the absence of evidence that assessments were fraudulently or mistakenly made, or that an improper method of valuation was pursued, consideration cannot be given to a claim that the taxes were excessive. (Id.)

See Constitutional Law, 2, 3; Occupational Tax; Public Lands, 1; United States Government, 3, 5.

## TAX SALES.

1. **TAXATION—INVALID SALE TO STATE—CONTINUANCE OF LIEN—JUDGMENT.**—In an action by the state controller to recover the possession of real property which had been conveyed to the state for delinquent taxes, a judgment decreeing that the state had no interest in or lien upon the property because of the invalidity of the original tax sale to the state is erroneous, since the lien of the state remains as a burden on the property until discharge by

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**TAX SALES (Continued).**

payment or by a valid sale to the state. (State v. Royal Consolidated Min. Co., 343.)

2. **ACTION BY STATE—POSSESSION OF PROPERTY—AFFIRMATIVE RELIEF—RIGHT OF DEFENDANT.**—In an action by the state controller acting under the provisions of section 3773 of the Political Code to recover the possession and the rents and profits of real property which had been deeded to the state for delinquent taxes, the defendant cannot, in the absence of statutory authority, convert the action into one to quiet title and obtain affirmative relief therein against the state. (Id.)
3. **CONSENT OF STATE—PROVISIONS AUTHORIZING CROSS-COMPLAINTS INSUFFICIENT.**—The provisions of the law authorizing cross-complaints do not give the consent of the state to a cross-complaint to quiet title in an action brought by the state controller, representing the state, for the possession and for an accounting of the rents and profits of real property deeded to the state for delinquent taxes. (Id.)
4. **RECOVERY OF RENTS—LOCAL CHARACTER OF ACTION NOT DESTROYED.** The local character of an action on behalf of the state to recover the possession of real property which has been conveyed to it for delinquent taxes, is not affected by the fact that the action is also one for the rents, issues, and profits of the property, since the action in so far as it relates to the rents is essentially one to quiet title within the meaning of the constitution. (Id.)

See Courts, 2.

**TEHAMA COUNTY CHARTER.** See Counties, 4, 6.

**TENDER.** See Vendor and Vendee, 6, 8.

**TIME.** See Contracts, 4; Insane Persons, 4.

**TITLE.** See Building Restrictions, 1; Deeds, 16; Landlord and Tenant, 1, 2; Public Lands, 5, 14; Slander, 1; Vendor and Vendee, 1, 3, 4, 9, 11, 13; Waters and Water Rights, 12.

**TITLE INSURANCE.** See Slander, 1.

**TORTS.** See Parties, 1.

**TRANSFER.** See Building Restrictions, 2; Findings, 2.

**TREASON.** See Criminal Law, 22.

**TREATIES.** See United States Government, 1-5.



**TRIAL.**

**CONTINUANCE — PENDENCY OF APPEAL — VALIDITY OF JUDGMENT — DISCRETION.**—Where the trial of an action involves the consideration of a previous judgment rendered between the parties to the action, which, if final, would be *res adjudicata* on some or all of the issues involved in the trial, the trial court in the exercise of a sound discretion may continue the trial of the case until the final adjudication of the matter in the other action. (Houghton v. Superior Court, 661.)

See Appeal, 5.

**TRUSTS.** See Gifts, 1.

**TUNNELS.** See Street Law, 2, 3.

**UNDUE INFLUENCE.** See Wills, 1, 2.

**UNITED STATES GOVERNMENT.**

1. **TREATY-MAKING POWER—POWERS RESERVED BY STATES.**—While the government of the United States is a government of delegated powers, the states retaining such powers as they have not delegated or surrendered to it, the people of the several states have surrendered the whole treaty-making power to the federal government, and vested it in the President and Senate of the United States (sec. 2, art. II, U. S. Const.), and have expressly excluded each state from all power in this regard (sec. 10, art. I, U. S. Const.). (In re Terui, 20.)
2. **TREATIES—SUPREME LAW.**—As to all matters within the treaty-making power conferred by the federal constitution, a treaty entered into on the part of the United States by the President with the concurrence of two-thirds of the United States Senate is a part of the supreme law of the land, binding on all states and to which all state enactments in conflict therewith must yield. (Id.)
3. **TAXATION—ALIENS—PREVENTION OF DISCRIMINATION—PROPER SUBJECT FOR TREATIES.**—The protection which should be afforded to the citizens of one country residing in another against discrimination in matters of taxation based solely on their alien citizenship is a proper subject of negotiation between our government and the government of other nations. (Id.)
4. **TREATIES—TERRITORIES.**—The word “territories” used in article I of the treaty between the United States and Japan was undoubtedly used as meaning the entire domain over which dominion was exercised by each of the sovereign nations, which, of course, in so far as the treaty-making power was concerned, included all of the states of the United States. (Id.)

## UNITED STATES GOVERNMENT (Continued).

5. **ALIEN POLL TAX LAW—INVALIDITY OF.**—In view of the provisions of the existing treaty between the United States and Japan, providing, among other things, that the citizens or subjects of neither shall be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects, the alien poll tax law of California is ineffective for any purpose with relation to any citizen of Japan. (Id.)

## VENDOR AND VENDEE.

1. **FAILURE OF TITLE—NONLIABILITY FOR DAMAGES—NOTICE.**—In an action to foreclose a purchase money mortgage, the defendant cannot recover damages for failure of title to a portion of the land, in the absence of fraud, although the conveyance to him included this portion of the land, where the grantor knew that it did not have title thereto, or at least that a railroad company was occupying and claiming it adversely, and the grantee was aware that at least some portion of this land was claimed and occupied by the railroad as a right of way. (Cement Co. v. Land Co., 175.)
2. **GRANT BY CONGRESS—ADVERSE CLAIM—NOTICE.**—An act of Congress under which land is claimed by a railroad company, being a public statute, is constructive notice to both parties to a conveyance of the land of the adverse claim of the railroad company. (Id.)
3. **EXAMINATION OF TITLE—MISTAKE—RESCISSION.**—It is well settled that, in the absence of fraud or an agreement, express or implied, for a good or particular title, a purchaser of land buys at his peril and is bound to look to the title and competency of the vendor. Therefore a purchaser cannot rescind on the ground that he was mistaken as to his vendor's title. But where both parties are under a mistake as to the vendor's title, equity will relieve the purchaser from the contract. (Id.)
4. **EXPRESSION OF OPINIONS.**—Mere expressions of opinion as to the sufficiency of the title, when the means of information are equally accessible to both parties, or the same facts are within the knowledge of both parties, and when no confidential relation exists between them, do not constitute fraud or deceit on the part of the vendor. It is a mere statement of opinion, and does not justify the party to whom the statement is made in relying thereon. (Id.)
5. **MATURITY OF FINAL PAYMENT—DUTIES OF PARTIES.**—When the final payment comes due under a contract for the sale of land in which time is of the essence of the contract, the obligation to make the payment and the obligation on the part of the vendor

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**VENDOR AND VENDEE (Continued).**

to make a deed are dependent and concurrent conditions. (Kerr v. Reed, 409.)

6. **TENDER OF DEED—WAIVER.**—A vendee under a contract of sale may either expressly or by implication waive the tender of a deed by the vendor, or tender may be excused by conduct showing that it would be a vain and useless ceremony. (Id.)
7. **QUESTION OF FACT—APPEAL.**—Waiver of tender of a deed under a contract of sale is a question of fact, and when supported by sufficient evidence to justify the inference of waiver the finding is binding upon the appellate court. (Id.)
8. **FAILURE TO TENDER DEED—SUBSEQUENT SALE—RESCISSION—RIGHT OF VENDEE.**—Where both parties under a contract of sale, in which time was made of the essence, allowed the date of final payment to pass without action, and the vendor subsequently sold the land to a third party without putting the vendee in default by a tender of a deed, he thereby breached his obligation, and the vendee was entitled to treat such sale as a rescission of the contract and to sue for a recovery of moneys paid. (Id.)
9. **EXECUTORY CONTRACT—PRIOR APPROVAL OF TITLE.**—An approval of title by a purchaser before entering into a contract of purchase does not, in the absence of an express agreement, or of facts constituting an estoppel, operate as a waiver of the right to a deed carrying the title, on the final execution of the contract. (Craig v. White, 489.)
10. **PAYMENT AND ACCEPTANCE OF DEED—PRIOR APPROVAL OF TITLE.** Ordinarily the payment of the purchase price and acceptance of a deed to land, after approval of title by the purchaser, precludes him from rescinding or recovering the purchase money upon failure of his title. (Id.)
11. **MERCHANTABLE TITLE—IMPLIED AGREEMENT.**—In case of an executory contract, there is an implied agreement on the part of the vendor to convey a merchantable title, and failure to do so on demand and upon tender of final payment is a breach of the contract which justifies rescission and recovery of the money paid by the purchaser. (Id.)
12. **PLACING OF DEED IN ESCROW—CONTRACT NOT EXECUTED.**—The placing in escrow of a grant, bargain, and sale deed without express covenants, to be delivered to the grantee upon the completion of stated payments, and providing for a forfeiture of all rights of the grantee for failure to make any payments within thirty days after maturity, does not, on its face, constitute an executed conveyance such as to merge the implied agreement of the contract to convey a good title into the covenants of the deed. (Id.)

**VENDOR AND VENDEE (Continued).**

- 13. EXAMINATION AND ACCEPTANCE OF IMPERFECT TITLE—ESTOPPEL.**—An examination and acceptance of an imperfect title, precedent to entering upon a contract to purchase, might operate as an estoppel against rescission, either by express agreement or under circumstances giving substantial advantage to the purchaser, or operating to the detriment of the vendor. (Id.)
- 14. RESCISSION—WAIVER—KNOWLEDGE.**—A waiver of right of rescission implies knowledge, actual or constructive, of the existence of the right and an intention to relinquish it. (Id.)
- 15. NOTICE OF RESCISSION—WANT OF LACHES.**—A purchaser is not guilty of laches in failing to give notice of rescission before the time has arrived for final payment and delivery of the deed, since the vendor has until such time to make his title good. (Id.)

See Accounting, 2; Contracts, 8, 10.

**VENUE.** See Deeds, 8, 11-13; Fixtures, 8.

**VERDICT.** See Insane Persons, 5; Life Insurance, 2.

**WAIVER.** See Appeal, 19; Bonds, 9; Building Restrictions, 4, 5; Contracts, 12; Evidence, 1; Negligence, 27; Vendor and Vendee, 6, 7, 9, 10, 14.

**WAREHOUSEMEN.** See Bailments, 1; Contracts, 6.

**WARRANTY.** See Sales, 2.

**WATERS AND WATER RIGHTS.**

- 1. STATE WATER COMMISSION—APPLICATION FOR APPROPRIATION—ARBITRARY DENIAL.**—The State Water Commission created by the act of the legislature (Stats. 1913, p. 1012) does not possess and could not be invested with power to arbitrarily deny an application made in conformity to the act for the appropriation of water that is subject to appropriation. (Tulare Water Co. v. State Water Com., 533.)
- 2. PERMITS FOR APPROPRIATION OF WATERS—POWERS OF COMMISSION.** The State Water Commission under the act of 1913 has only supervisory discretion in the matter of granting permits for the appropriation of unappropriated waters of the state. (Id.)
- 3. EXERCISE OF DISCRETIONARY POWERS—MANDAMUS.**—*Mandamus* is a proper remedy to compel a reasonable exercise of such discretionary powers as are granted by the act creating the State Water Commission. (Id.)
- 4. COMMISSION WITHOUT JUDICIAL POWERS—CONSTITUTIONAL LAW.**—In view of section 1 of article VI of the constitution vesting

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WATERS AND WATER RIGHTS (Continued).

in the courts therein mentioned the entire judicial power of the state, it is not within the power of the legislature to give to the State Water Commission the judicial power to establish and declare the right and title to private property. (Concurring opinion of Shaw, C. J.) (Id.)

5. **APPROPRIATIONS — PROTECTION — CONSTRUCTION OF ACTS OF CONGRESS.**—Under the act of Congress of July 26, 1866, and the supplemental act of July 9, 1870, providing that wherever by priority of possession rights to the use of water have vested and accrued, and the same are recognized by the local customs, laws, and the decisions of the courts, the possessors and owners thereof shall be maintained and protected therein, the only rights which are confirmed by such enactments are those recognized by the customs, laws, and decisions of the courts in the particular state in which the appropriation is made and in which the land affected lies. (Canal & Irrigation Co. v. Worswick, 674.)
6. **RIPARIAN RIGHTS—LOWER APPROPRIATOR.**—The rights of a riparian owner in the waters of the abutting stream are not affected by any interference with the waters of the stream made on privately owned land after they pass below the boundaries of such riparian land, and such use below, no matter how long continued, or what may be the nature of the claim of right thereto by the user thereof, in no manner affects the riparian rights pertaining to the land above the place of use and point of diversion. (Id.)
7. **LOWER APPROPRIATION—SUPERIORITY OF UPPER RIPARIAN RIGHTS —ACTS OF CONGRESS.**—Inasmuch as neither the local customs, laws, and decisions of the California courts had ever recognized or upheld the doctrine that water rights acquired by an appropriation or diversion below on private land would be superior to the riparian rights pertaining to any land above the place of diversion, the conclusion is inevitable that the acts of Congress of 1866 and 1877 neither create such superior rights nor provide for the maintenance or protection thereof. (Id.)
8. **DIVERSION UPON PUBLIC LAND—SUBSEQUENT PURCHASE OF UPPER GOVERNMENT LAND—SUPERIORITY OF RIGHTS OF LOWER APPROPRIATOR.**—Under the acts of Congress of 1866 and 1870, where a diversion is made on land then belonging to the United States, the right of the appropriator to the water thereby taken is superior to the riparian rights of a subsequent purchaser of land from the United States lying above the point of diversion. (Id.)
9. **APPROPRIATIONS—DIVERSION ON SWAMP AND OVERFLOWED LANDS—SUPERIORITY OF RIGHTS OF SUBSEQUENT UPPER RIPARIAN PURCHASERS.**—Where appropriations of water from a river were made in the years 1871 and 1872, and the dams and headgates were

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WATERS AND WATER RIGHTS (Continued).

situated on tracts of land of the character known as swamp and overflowed lands which were granted by the United States to the state by the act of September 28, 1850, but not patented to the state until June 10, 1896, such appropriations were not superior to the riparian rights of subsequent purchasers of public lands from the United States situated above the place of such diversion, since such swamp and overflowed lands were not at the time of diversion the property of the United States. (Id.)

10. DESERT LAND ACT OF 1877—APPROPRIATION OF SURPLUS WATER—LIMITATION TO DESERT LANDS.—The Desert Land Act of March 3, 1877, providing that the right to the use of water shall depend upon *bona fide* appropriation and that all surplus water over such actual appropriation and use shall remain free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights, applies only to desert lands, and does not apply to all the public lands of the United States, so as to make the rights of appropriators paramount to riparian rights. (Id.)
11. QUIETING TITLE—ESTOPPEL OF UPPER RIPARIAN OWNERS—BURDEN OF PROOF.—In an action to quiet title to water rights by appropriators who had been diverting the water by means of canals and devoting the same to public use for more than forty years, as against upper riparian owners who had permitted the water during the entire period to flow by their own lands without any use thereof, the burden was upon the plaintiffs, in support of their contention that the defendants were estopped, to prove, if material to the estoppel, that they had knowledge, not only of the existence of the canals and the diversion of the water thereby from the river, but also that the same was being devoted to public use, and evidence of extracts from articles published in a newspaper referring to the size of the canal and extent of territory to be irrigated thereby, but not definitely stating the character of the use, was not sufficient to show such knowledge. (Id.)
12. PUBLIC USE OF WATER BY LOWER APPROPRIATOR—ACQUIESCENCE BY UPPER RIPARIAN OWNER—ESTOPPEL.—An upper riparian owner is not estopped from asserting that his title as such owner is paramount to the right of a lower appropriator, by reason of the fact that he permitted the water to flow by his own land without use and to be diverted by the appropriator for public use, since in order to constitute an estoppel of such a character the person sought to be estopped must have failed to do some act which it was within his power to do and the person claiming the estoppel must have relied on such failure to an extent and for such a period that the subsequent doing of such act would cause him injury. (Id.)

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**WATERS AND WATER RIGHTS (Continued).**

- 13. PUBLIC USE—PRESCRIPTIVE RIGHT—UPPER APPROPRIATOR.**—A person, although not a riparian owner, may acquire a prescriptive right as against a public use below by taking water out of the stream above which otherwise would run down to the canals of the public service corporation. (Id.)

**WILLS.**

- 1. UNDUE INFLUENCE—INSUFFICIENCY OF EVIDENCE.**—In a will contest upon the ground of undue influence it must be shown that the undue influence operated upon the mind of the testator at the time of the execution of the will, and where there is not only no evidence of the exercise of influence at or about the time of the execution of the will, but no evidence that at any time any of the parties charged with the exercise of undue influence, other than the attorney who prepared the will, ever addressed themselves in any manner, directly or indirectly, to the deceased in relation to the execution of the will in question, or any other will, and there is no evidence that the attorney exercised any undue influence over the testator, it was proper for the court to withdraw the issue of undue influence from the jury. (Estate of Wall, 50.)
- 2. PLEADING—DENIALS—SUFFICIENCY OF.**—In a will contest on the ground of undue influence and insanity, where the answer of the executor denied the allegations of the petition, the failure of the heirs charged with undue influence to deny the allegations is of no significance, as the plaintiff could not secure the revocation of the will without overcoming all of the opposition to such revocation, which required proof of all material allegations put in issue by the executor's answer. (Id.)
- 3. EVIDENTIARY MATTERS.**—In such a case it is not necessary to deny evidentiary matters, and the failure to do so does not admit such evidence where the answer specifically denies each and every allegation of the exercise of undue influence upon the testator at the time of, or in connection with, the execution of the will in question. (Id.)
- 4. SMALL BEQUEST TO WIFE—WHEN WILL NOT UNNATURAL—INHARMONY.**—A will is not unnatural because it bequeaths only a small amount to the surviving wife, where the decedent had begun one action for divorce and contemplated another, and letters by the testator, written long before the will was executed, made it plain that he had no affection or regard for his wife; but even if the will is unnatural, this fact alone would not justify a verdict based upon undue influence. (Id.)
- 5. MOTION FOR JUDGMENT ON PLEADINGS—MATERIAL FACTS PUT IN ISSUE BY ANSWER.**—In a will contest a motion for a judgment



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**WILLS (Continued).**

on the pleadings is properly denied where all the material facts are put in issue by the answer. (Id.)

6. **FORM OF JUDGMENT.**—In a will contest, where the judgment after stating that the jury duly rendered their verdict in favor of defendant decrees that the executor recover his costs from plaintiff, the appellant is not injured by the failure to expressly deny her petition for revocation of the probate of the will, although the judgment should have done so. (Id.)
7. **ESTATES OF DECEASED PERSONS — INTERPRETATION — INTESTACY NOT FAVORED.**—An interpretation of a will leaving a portion of an estate in a state of intestacy is not favored by the law. (Estate of Carrillo, 597.)
8. **DOUBTFUL WORDS AND PHRASES — INTENT — SURROUNDING CIRCUMSTANCES.**—Doubtful words and phrases in a will should be so construed as to give effect, if reasonably possible, to the intent of the testatrix, and in ascertaining such intent, resort may be had to the circumstances under which the will was executed. (Id.)
9. **BEQUESTS OF "CASH" LEFT AT DEMISE—CONSTRUCTION OF WILL —NOTE AND MORTGAGE.**—Where a testatrix, after disposing of numerous articles of personal property to her various relatives and making a devise and several bequests of personal effects to her daughter and to her brother, separately bequeathed to each of them "one-third of cash that is left after my demise," and at the time of the execution of the will a portion of her estate consisted of money due her from the estate of her deceased husband, which expected increment was still in the form of money due and payable at the time of her demise, and thereafter her administrator received the promissory note and a mortgage of the executors of her deceased husband's estate for the unpaid balance of such indebtedness, such note and mortgage were properly construed as "cash" within the meaning of such bequests. (Id.)

**WITNESSES.** See Evidence, 1, 3, 4.

**WORKMEN'S COMPENSATION ACT.**

1. **PLAYFUL OR MALICIOUS ACT OF FELLOW-EMPLOYEE—INJURY OUTSIDE OF EMPLOYMENT.**—An injury received by an employee while engaged in his work from being hit in the eye by one of several grapes either playfully or maliciously thrown by a fellow-employee at another employee was not an injury arising out of, or in the course of, his employment within the meaning of the Workmen's Compensation Act. (Insurance Co. v. Industrial Acc. Com., 284.)
2. **FRIENDLY WRESTLING MATCH—INJURY OUTSIDE OF EMPLOYMENT.**—An injury received by an employee while in the performance of his duties from being accidentally fallen upon by two fellow-

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**WORKMEN'S COMPENSATION ACT (Continued).**

employees who were engaged in a wrestling match, which was not caused by any dispute over the work or over anything connected with the employment, was not an injury arising out of, or in the course of, his employment within the meaning of Workmen's Compensation Act. (*Power Co. v. Industrial Acc. Com.*, 295.)

**3. DEPENDENT MINOR—MERETRICIOUS RELATIONSHIP WITH MOTHER.—**

Under the Workmen's Compensation Act a minor is entitled to compensation for the death of an employee as a dependent member of his household in good faith, although the relations between the mother of the minor and the employee were meretricious, where they all lived together and he supported the mother and minor as if they were his own wife and daughter. (*Insurance Co. v. Industrial Acc. Com.*, 469.)

**4. SUPPORT OF MINOR—LIABILITY OF FATHER—IMMATERIALITY.—**

Under the Workmen's Compensation Act the right of a minor to compensation as a dependent member of the family of an employee is not affected by the fact that the father of the minor is legally liable for its support under sections 205 and 206 of the Civil Code. (*Id.*)

**5. REVIEW OF PROCEEDINGS—POWER OF COURT.—**An annulment of an award of the Industrial Accident Commission is authorized only when the commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, or when the findings of fact do not support it. (*Dearborn v. Industrial Acc. Com.*, 591.)

**6. COMPENSATION FOR DEATH—NONCASUAL CHARACTER OF EMPLOYMENT—SUFFICIENCY OF EVIDENCE.—**In this proceeding to review an award of compensation for death, the finding that the employment of the deceased was not casual under section 8 (c) of the Workmen's Compensation Act of 1917 is held to be supported by the evidence and, as a consequence, that the commission did not exceed its jurisdiction in making the award. (*Id.*)

**7. POWER OF LEGISLATURE—CONSTITUTIONAL LAW.—**The legislature has no power under section 21 of article XX of the constitution to create and enforce a liability on the part of any person not an employer to compensate persons who do not sustain to him the relation of employee, or to create courts or commissions having judicial power for the settlement of disputes concerning such liability between persons who do not sustain the relation of employer and employee to each other. (*Assurance Corp. v. Industrial Acc. Com.*, 615.)

**8. INJURY TO MEMBER OF PARTNERSHIP—LACK OF JURISDICTION OF COMMISSION.—**The Industrial Accident Commission has no jurisdiction to entertain an application or to make an award of compensation to a member of a partnership, where such member

**WORKMEN'S COMPENSATION ACT (Continued).**

was not an employee of the firm at the time of his injury, but an equal member performing without wages his part of the work and business and receiving and to receive his only reward therefor out of an equal division of the profits. (Id.)

9. **INSURANCE CARRIER—LISTING OF PARTNER AS EMPLOYEE—ESSENCE OF ESTOPPEL.**—An insurance carrier of a partnership is not estopped from claiming that a member of the partnership was not an employee, by reason of the fact that such partner was expressly listed in the policy as an employee, since jurisdiction cannot be conferred upon a tribunal of limited powers either by the direct agreement of the parties or by an estoppel growing out of such an agreement. (Id.)
10. **FATAL INJURY TO EMPLOYEE WITHOUT DEPENDENTS—PAYMENT OF EMPLOYER TO STATE—CREATION OF FUND FOR DISABLED WORKMEN—POWER OF LEGISLATURE—CONSTITUTIONAL LAW.**—The legislature has not the power under section 21 of article XX of the constitution, as amended in 1919, vesting it with power to create and enforce a complete system of workmen's compensation, to require an employer to pay to the state a certain sum whenever one of his workmen who has no dependents is killed by an injury received in the course of his employment, and to confer jurisdiction on the Industrial Accident Commission to adjudicate the liability of the employer therefor to the state, and the act of the legislature (Stats. 1919, p. 273) so providing, enacted for the purpose of creating a fund for the promotion of vocational re-education and rehabilitation of persons disabled in industry in this state and to provide funds for the insurance bureau of the commission, is unconstitutional. (Yosemite L. Co. v. Industrial Acc. Com., 774.)
11. **CONSTITUTIONAL LAW—FUND FOR DISABLED WORKMEN—JURISDICTION OF INDUSTRIAL ACCIDENT COMMISSION—POWER OF LEGISLATURE.**—While, under its general powers, the legislature might provide a fund for the benefit of persons disabled in industry in this state and commit the administration of the fund to the Industrial Accident Commission, and might also levy a tax in some form to raise such fund, any disputes that might arise concerning such tax would be cognizable only by the courts established by or under the provisions of article VI of the constitution, since no section of the constitution gives the legislature power to confer jurisdiction thereof upon such commission. (Id.)

See Writ of Review, 3.

**WRIT OF REVIEW.**

1. **WHEN LIES.**—To grant a writ of review it must appear that an inferior tribunal, board, or officer, exercising judicial functions, has exceeded its or his jurisdiction, that there is no appeal from

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**WRIT OF REVIEW (Continued).**

the judgment sought to be reviewed, nor, in the judgment of the court to which the application for the writ is made, any plain, speedy, and adequate remedy; and the review upon such writ cannot be extended further than to determine whether the inferior tribunal, board, or officer had regularly pursued his or its authority. (*Brecheen v. Riley*, 121.)

2. **ORDER IN ADVANCE OF FINAL ADJUDICATION.**—A writ of *certiorari* does not lie to review an order made in a matter prior to the final adjudication thereof. (*Gumilla v. Industrial Acc. Com.*, 638.)
3. **WORKMEN'S COMPENSATION ACT—ORDER GRANTING REHEARING—PREMATURE APPLICATION.**—A writ of *certiorari* will not lie to review an order of the Industrial Accident Commission granting a rehearing of an award where the application for the writ is made before the final decision of the commission on the rehearing. (*Id.*)













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